91-2062

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Supreme Court, U.S.
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In the Supreme Court of the United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

_____/

Petition for Writ of Certiorari

to the

United States Court of Appeals for the
Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Did the IRS' violation of a statute designed to protect handicapped persons absent on workers' disability compensation constitute evidence of discrimination on the basis of handicap?

2. Did the ruling of the Sixth Circuit conflict with the Rehabilitation Act when it placed the burden of complying with federal regulations mandating promotional opportunity on handicapped workers instead of on the employer, the federal government?

3. Did the Respondent's ouster of Petitioner, by an invalid involuntary disability retirement, preclude Petitioner from

receiving notice of promotional opportunities afforded similarly situated employees who were not involuntarily retired?

There is no parent or subsidiary corporation to be listed in this case.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

Decision of the United States District Court for the Eastern District of Michigan

Decision of the Merit Systems Protection Board

Decision of the United States Court of Appeals for the Sixth Circuit

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is based on The Rehabilitation Act, 29 U.S.C. 701, et. seq.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The applicable statutory provision 5 U.S.C. 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation under

this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service.

"(b) Under regulations issued by the Civil Service Commission:

(11) The department or agency which was the employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of compensation....[t]he first to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion....(emphasis added.)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

("b) Under regulations issued by the Office of Personnel Management -

"(1) The department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation...the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion...."

The Federal Personnel Manual provisions in effect during the required time period provide:

"Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed, or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved." **F.P.M. Sub chapter 3-1.**

"When employees sustain a compensable injury....the agency must tell them....about.... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave of absence must know exactly when to report for work after recovering from injury....On

things employees must decide for themselves, they should have all the information necessary to make a good decisions, for example, decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until returning, and the right to leave their retirement deductions or to take a refund." **F.P.M. Appendix A-1(e).**

"If any employee has recovered within one year after the date of compensation begins...the employee is entitled to resume his or her former or an equivalent position." **F.P.M. Subchapter 2-6(A)(1).**

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee full recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination." **F.P.M. Subchapter 2-6(a)(4).**[emphasis added]

"Of an employee's recovery takes longer than one year from the date compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his her former or an equivalent position...." **F.P.M. Subchapter 2-6(a)(3).**

"**Restoration right is agency wide.** The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency." **F.P.M. Subchapter 4-2(b).**

"An agency must consider absent employees for every promotion they would be considered for if they were present." **F.P.M. Subchapter 3-2(a).**

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present." **F.P.M. Subchapter 3-2(b).**

29 C.F.R. 1613.704 required, during the relevant period:

"(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

"(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of

examinations, the provision of readers and interpreters, and other similar actions.

I.) STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit, from a decision filed December 13, 1991. The Court of Appeals denied the appeal of Petitioner, Charles E. Gavette, from a grant of summary judgment to Respondent, Internal Revenue Service [IRS]. Summary judgment was granted by the United States District Court of the Eastern District of Michigan.

Petitioner, an IRS employee, filed a complaint alleging, inter alia, handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 in the District Court, following the EEOC cancellation of his claims of handicap and age discrimination. This petition is based on

the denial below of his handicap discrimination claims.[1]

Petitioner was awarded worker's disability compensation for two distinct periods of time, August 3, 1979, to May 7, 1982; and January 25, 1985, to January 8, 1986. As a result of the IRS' failure to notify him of his re-employment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 U.S.C. Sec. 8151, and F.P.M. 353, Petitioner filed two EEOC complaints alleging handicap and age discrimination. When

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[1] Petitioner filed a claim with the Merit Systems Protection Board [MSPB]. The MSPB found that IRS violated his rights to notice of promotion and to promotion, and ordered IRS to treat him as if he had been present for purposes of promotion. IRS filed a certificate of compliance, contending that since Petitioner failed to file an interest card, he could not be considered for promotion. Petitioner did not challenge the IRS certification, but continued to pursue his handicap discrimination case, which was already pending in District Court. This is not an appeal from the MSPB decision.

the EEOC canceled his claims, he filed the instant action. This petition is based on dismissal of his handicap discrimination claim, only.

In addition, Petitioner appealed the IRS's refusal to give him re-employment and promotion rights, pursuant to 5 U.S.C. 8151 and Federal Personnel Manual 353 to the Merit System Protection Board (MSPB). The MSPB held that IRS violated these regulations when it and failed to give Petitioner his re-employment and promotion rights. App.at 29.

The District Court dismissed the lawsuit on December 19, 1990, finding, inter alia. that there was no record of handicap discrimination in the case. App. at p. Petitioner appealed the District Court's denial of his handicap discrimination claim to the Court of Appeals for the Sixth Circuit.

The Court of Appeals, App at 38, held that Petitioner

did not satisfy his burden to respond to Respondent's motion for summary judgment. The appeals court noted that Petitioner pointed to some evidence he claimed demonstrated that he was the victim of disparate treatment[2], because he did not receive notifications afforded able-bodied employees. The Court found, however, that was not the theory on which

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[2] Petitioner argued that the IRS requires employees to fill out a Form 4536, or interest card, in order to be considered for promotions. Petitioner never filled out an interest card because he never knew he was entitled to promotion and further, did not know what positions were available. Following the MSPB decision that it violated 5 U.S.C. 8151 and F.P.M. 353, the IRS relied on GAVETTE's failure to file an interest card to justify failing to promote him.
However, all Merit Placement Announcements issued by the IRS require, "Managers should ensure that eligible employees under their supervision are informed in sufficient time to apply (or file Form 4536 for their employees)." This affirmative duty imposed on managers for employees who are not absent because of worker's compensation-related handicaps, contrasts with the IRS' failure to even notify absent handicapped employees of their rights and of openings, and therefore constitutes evidence of disparate treatment.

Petitioner proceeded in the District Court. [3] The Court

[3] This was not accurate. Petitioner advanced a theory that the policy of not notifying injured workers of their rights had a disparate impact on injured workers. All able-bodied workers had to do was read the bulletin board while at work to be apprised of promotional opportunities.

Petitioner claimed the policy practiced by IRS caused him to be treated differently from able-bodied workers in two respects.

1. By not telling him he was eligible for promotions while on sick leave, Petitioner was induced not to act.

2. An injured or sick worker is not on the premises to read the bulletin board. The worker is at home or at a hospital recuperating. In Petitioner's case, he was classified as involuntarily retired -- he was not an active employee of IRS and had no right to even enter the premises. Therefore, the bulletin board relied on in the Court of Appeals' decision was not relevant because it was not accessible to him.

The policy and the resulting disparate impact on handicapped persons violated the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq, the handicap discrimination statute on which this case was brought.

proceeded to review other evidence of disparate treatment. Petitioner contended, based on the deposition testimony of Sharon Hays, a personnel staffing specialist designated by the IRS, that the IRS never personally notified individuals who were absent from work on workers' compensation of promotional opportunities.[4] At oral argument, IRS admitted posting job openings and promotion opportunities on a bulletin board at the workplace. The Court found that Petitioner should have checked these posted notices or should have called the office of personnel development for information.

The Court of Appeals did not consider Petitioner's

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[4] Hays testified that if they were to be notified, she was the person who would notify them, and that she did not do so. App. at _

theory that IRS' failure to follow notification requirements was evidence of discrimination.

II. STATEMENT OF FACTS

When Petitioner recovered from his second compensable illness, Petitioner requested his re-employment rights. App. at . IRS denied the request, claiming Petitioner was retired prior to the date of his illness. Therefore, he was not qualified for the immediate and unconditional re-employment rights of an employee who recovers from a compensable illness within one year. App. at

On September 16, 1987, the U.S. Department of Labor awarded him total disability compensation for the period of January 25, 1985, through January 8, 1986. App. at . On October 13, 1987, Petitioner again requested re-employment. App. at .

On March 11, 1988, he filed an administrative

complaint with the Equal Employment Opportunity Commision [EEOC], Agency No. 88-1082. The complaint concerned IRS' failure to inform Petitioner of his reinstatement rights, and IRS' refusal to reinstate Petitioner to make a final decision and to give Petitioner his appeal rights. App. at

The IRS responded on March 30, 1988, to the October 13, 1987, letter, App. at , and denied Petitioner's re-employment request. The IRS claimed the restoration rights of 5 U.S.C. 8151 did not apply because the compensable conditions arose after his alleged retirement. App. at .

The IRS' March 30, 1988 letter was inaccurate. Petitioner's illness commenced January 25, 1985, and he was employed by IRS at least through February 1, 1985. App. at . The Court of Appeals reversed the earlier involuntary retirement. See also, June 1, 1988, settlement of Civil Action

84 CV-4109-DT, which restored Petitioner to work, but preserved his right to pursue any rights he had to promotions under 5 U.S.C. 8151, including employment discrimination claims. App. at .

On May 10, 1988, Petitioner filed a second administrative EEOC complaint, Agency No. 88-1099. App. at . As a result of a Freedom of Information Act request, Petitioner learned IRS failed to inform him he was entitled to be considered for promotion during the first year of his absence from work. This failure occurred during his two separate work-related illnesses, commencing in 1979 and 1985. He also learned IRS failed to consider him for promotion.

On May 13, 1988 IRS declined to process the first EEO complaint, No. 88-1082. IRS contended that, since it had denied Petitioner's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual. IRS, by

letter dated June 14, 1988, App. at ., terminated the second EEO Complaint, No. 1099.

Petitioner appealed the two EEO Complaints to the EEOC on June 21, 1988 and July 6, 1988. The EEOC denied them on August 30, 1988 and September 1, 1988, respectively.

Petitioner petitioned the EEOC for review on September 28, 1988. On March 4 and March 6, 1989, Petitioner received the EEOC final decisions which again supported the IRS. On April 3, 1989, Petitioner timely appealed EEOC's final decisions.

For Petitioner's illness of August 3, 1979, to May 7, 1982, IRS failed to notify him of promotions during the first year of his absence, and failed to notify him of, and to consider him for, immediate and unconditional employment rights and of priority re-employment rights. Petitioner was re-employable as early as May 7, 1982, after the first illness.

IRS again failed to notify Petitioner of, and to consider him for, promotions during his second illness-related absence, January 25, 1985 to January 8, 1986. IRS also failed to notify him of or to consider Petitioner for immediate and unconditional employment rights, or of priority re-employment rights.

IRS admits it did not give Petitioner any promotion rights, pursuant to an internal policy. Under this IRS policy, persons absent on workers' disability compensation are not advised they are eligible for promotion and are not told about positions for which they are eligible to be promoted. App. at . This policy violates 5 USC 8151 and FPM 33.[5]

In addition to this policy, IRS also treats employees

[5] One issue raised in this Petition is that these violations constitute evidence of discrimination in determining liability under The Rehabilitation Act, 29 USC 701.

who are absent because of worker's compensation-related disablity differently from those absent for other purposes. IRS requires all employees to fill out interest cards before they can be considered for promotion. IRS policy requires managers to assist employees absent for other reasons to fill out these cards, but do not do so for those on workers' compensation. Petitioner claims this constitute's handicap discrimination.

1.) **IRS Violation of Federal Policy Constitutes Evidence of Discrimination and the Court's Failure To Consider This Evidence Was Error**

Petitioner presented three indices of discrimination to the Court of Appeals:

> (1) the violation of 5 C.F.R. Sect. 353.307 and the refusal to notify injured workers of their reemployment and promotion rights;
>
> (2) the violation of 5 C.F.R. Sect. 353.201(a) and the failure to provide a mechanism to consider injured workers for promotion, and

(3) maintaining a differential policy concerning interest cards.

The policy of failing to inform and to promote injured workers violates 5 C.F.R. Sect. 353.201(a):

> "Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or military duty can be considered for promotion."

It is undisputed that IRS does not do this.

5 C.F.R. 353.307 entitles an employee whose recovery takes longer than one year to priority consideration for restoration to the position, if an application for reappointment is made within 30 days after worker's disability compensation ceases. The application requirement is waived where the agency fails to advise the employee "of his rights, obligations, and benefits relating to his government employment." 5 C.F.R. 353.106.

This applies to the IRS interest card requirement, in

view of the agency's failure to advise Petitioner "of his rights, obligations, and benefits relating to his government reemployment." While the IRS requires employees to learn IRS policies, this must be viewed in the context of the requirement to advise employees of their rights and benefits. The IRS argument can be reconciled with the requirement to advise employees, only in the context of policies which comply with the law. The IRS cannot, as it does with handicapped persons, design policies which affirmatively conceal their rights from them, and then abdicate its responsibility to give these same handicapped persons the benefit of policies which were designed to help them, because they did not know about them.

IRS notifies all other absent persons about promotion rights and promotion opportunities. Its policies provide for management and supervision to fill out forms and interest

cards for these absent employees. IRS does not do the same for persons who are absent because of workers' compensation-related injuries.

IRS maintains that it does not discriminate against absent handicapped workers, because all employees must fill out interest cards prior to promotion. However, in light of the fact that it does not advise all employees that they have promotion rights, and that IRS policy provides for supervisors to fill out interest cards for employees absent for reasons other than work-related disabilities, IRS policy discriminates against absent handicapped workers. If the agency fails to notify a person of the opportunity to be promoted, it is irrelevant what else it does, because the person is not going to file an interest card and apply for positions he or she does not know about, and which he or she does not know they are

entitled to apply for.[6] However, IRS compounds this by ensuring that other absent employees send in interest cards, even if their supervisors fill out and send in their cards for them.

IRS further argues that it does not discriminate on the basis of handicap because it tells no one that injured workers have re-employment and promotion rights. This argument is specious. The requirement that injured workers be considered for promotion as if they were present does not apply to anyone except injured workers. Nothing would be

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[6] Petitioner advised the Court that he was never informed of promotional opportunities while off the job on a workers compensation related condition. He had no reason to check bulletin boards because he was never told he was eligible to be promoted in the first place. He further stated that he filed interest cards when he became aware of opportunities and the only reason that he did not file cards during the period of his disability was that he was not informed of his promotional rights or of job openings.

gained by telling non-injured workers about these rights. Therefore, IRS can not claim it does not discriminate because it tells no one about the requirement to promoted injured workers as if they were present.

IRS' argument, however, misses the point. Whether it treats everyone the same by not telling anyone of handicapped workers' rights, and even whether it does not follow its own policy of requirirng supervisors and managers to fill out interest cards for other absent workers, has nothing to do with the fact that it violates the regulations requiring it to give handicapped workers these rights.

What the lower courts failed to acknowledge is that where an agency of the United States government violates a regulation designed to protect a protected class, that violation is itself evidence of discrimination. The lower courts erred in refusing to consider the finding by the MSPB that the IRS

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violated the mandates of the F.P.M. and the requisite federal statutes.[7]

The MSPB found the IRS violated a rule specifically designed to assist handicapped workers.

[8] MSPB findings on an employment discrimination claim are admissible as evidence in a later trial de novo. Rana v. United States, 812 F 2d 887, 43 FEP cases 161, 162 (4th Cir.

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[7] This is different from a finding of failure on the part of an employer to follow its own regulations and procedures, which alone, may not be sufficient to support a finding of discrimination. Johnson v. Lehman, 28 FEP Cases 1485, 1488 (D.C. Cir. 1982).

[8] This contrasts with McIntosh v. Weinberger, 810 F. 2d 45 FEP Cases 398, 410 (8th Cir. 1987) where the agency's di of OPM regulations was not directed against the cases to plaintiffs belonged, but were rather general and per affecting all applicants, regardless of their race or n origin. The Court held that because of the general impact applicants, the failure to follow guidelines did not amo intentional discrimination.

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1987), citing, cf., Chandler v. Roudebush, 425 U.S. 840, 863 n.39, 12 FEP Case 1368 (1976).[9]

The evidentiary function of violation of another statute designed to protect a class also protected under an antidiscrimination act was demonstrated in Whitlock v. Donovan, 598 F.Supp 126, 36 FEP Cases 475 (D.C. 1984). Whitlock involved the relationship between the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 and the Rehabilitation Act of 1973.

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[9] Plaintiff in Rana asked the court for relief from the statutorily prescribed procedure which permitted the court conducting a denovo trial of a discrimination claim, to review the finding of the MSPB. The court, rejecting this argument, quoted Justice Hughes: "Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system." Sorrells v. United States, 287 U.S. 435, 350 (1932). Rana, supra, 43 FEP Cases at 162-63.

The Whitlock Court held that alcoholism is included for purposes of the handicap discrimination protection of the Rehabilitation Act of 1973. Under Section 501 of the Act, federal agency employers such as the Department of Labor [and the IRS] have a duty of affirmative action toward handicapped employees and applicants. Section 501 was intended to make the federal government a 'leader' or 'model employer' of the handicapped. The Court held that this requirement is more than a requirement of non-discrimination or even-handed treatment.[10] Whitlock, supra, 36 FED Cases

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[10] 29 C.F.R. Sect. 1613.704 required, during the relevant period:

> "(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

"(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions."

In the case at bar, the accommodation sought was less expensive and less burdensome than accommodations suggested in (b). For example, when persons are absent on worker's disability compensation, they are mailed information concerning their worker's disability compensation rights. How burdensome would it be if in the same mailing, these people were notified of their rights to re-employment and to promotion? Once an employee received this notice, it would not be unreasonable to require that interest cards be filled out, indicating the geographical areas and type of employment which would be acceptable. Pursuant to the IRS policy requiring supervisors to fill out interest cards for employees absent for reasons other than worker's disability compensation-related handicaps, the last supervisor could fill out the interest cards of these employees as well. The IRS would then be required to mail notices of promotions pursuant to these interest cards only. This is a far different procedure from requiring employees to fill out interest cards when they do not even know they are eligible for promotion, and have no way of learning the available positions.

at 428.

The Court viewed the Rehabilitation Act in concert with the requirements of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.

> "These statutes viewed together in the light of their legislative history show Congress's firm intention to require federal employers to exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for performance deficiencies related to drinking. It is this duty, which is subsumed under the 'reasonable accommodation' requirement of Section 501(b) of the Rehabilitation Act and the regulations 29 C.F.R. Sect. 1613.704, that plaintiff has invoked." Whitlock, supra, 36 FEP Cases at 428.

The court then reviewed publications issued by the U.S. Office of Personnel Management [OPM], including the Federal Personnel Manual [FPM], to consider procedures

which the agency was required to pursue in order to satisfy its duty to accommodate under the Rehabilitation Act. Whitlock, supra, 36 FEP Cases at 428-30. Based on this review, as applied to the history of plaintiff at the Department of Labor, the Court found that the Department of Labor failed to follow the procedures established by OPM.[11] This demonstrated a failure to accommodate plaintiff, and since the agency failed to show that it could not accommodate without undue hardship, the court found that the agency violated its duty to the handicapped employee. Whitlock, supra, 36 FEP Cases at 433.

Relevant to the case at bar, is that the Whitlock

[11] For example, the regulations require an agency to evaluate all available evidence in deciding whether a disease is responsible for an employee's unacceptable performance. This the agency did not do. Whitlock, supra, 36 FEP Cases at 433.

Court, unlike the courts reviewing petitioner's claim, did not ignore the evidence of violation of federal regulations by the agency, but instead used these violations to demonstrate a failure to accommodate plaintiff's handicap.

This principle applies to violations of merit selection procedures as well.

> "[W]hen the federal government is involved, deviation from legally mandated civil service procedures and requirements cannot form the basis of a legitimate, lawful explanation sufficient to overcome a prima facie case of discrimination. Unlike a private employer, a federal agency is simply not free to run its employment practices in any way it sees fit. Congress and the Civil Service Commission (now the Office of Personnel Management) mandate by law and regulation procedures and practices whose purpose is to result in selection based on true merit. Serious and substantial deviations from these procedures...cannot be used to justify the non-selection of a qualified [individual]. Indeed, such deviations are themselves indicia of discrimination that serve to rebut Defendant's proffered 'legitimate and non-discriminatory' reasons." Hogan v. Pierce, 31 FEP Cases 115, 126 (DC 1983).

The courts below erred in not considering the IRS' serious and substantial deviations from procedures mandated by the F.P.M. and by statute as indicia of discrimination in the case at bar. Separate and apart from evidence of disparate treatment in the filing of interest cards, the courts committed error in ignoring the uncontested fact that the IRS violated the very regulations designed to protect the class to which petitioner belonged, that of handicapped workers absent because of worker's disability compensation.

Had the reviewing courts given these violations appropriate evidentiary weight, they could not have found that Petitioner failed to produce evidence of discrimination.

By rejecting the evidentiary significance of violations of statutes and federal regulations designed for the benefit of the same protected class, the decisions of the courts below constitute a departure from the accepted and ususal course of

judicial proceedings, warranting the exercise of this Court's power of supervision.

2} The ruling of the Sixth Circuit conflicted with the Rehabilitation Act when it placed the burden of complying with Federal regulations mandating promotional opportunity on handicapped workers instead of on the employer, the Federal government.

Section 501 of the Rehabilitation Act required federal employers to undertake affirmative action on behalf of the handicapped. The Sixth Circuit Court of Appeals has held that this affirmative obligation goes beyond thaqt set out in section 504, which, by its terms, requires only non-discrimination. Hall v U.S. Postal Service, 857 F.2d 1073, 47 FEP Cases 1540, 1543 (6th Cir. 1988).

Other circuits have similarly held. In Reyon v. FDIC, 565 F.2d 762, 763, 15 FEP cases 1043 (D.C. Cir. 1977) the Court stated,

"...[S]ection 501 "imposes a duty upon federal

> agencies to structure their procedures and programs so as to ensure that the handicapped individuals are afforded equal opportunity in both job assignment and promotion."
> See also, Rewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. 1981; Mantolete v. Bolger, 767 F.2d 1416, 1421, 38 FEP Cases 1081 (9th Cir. 1985); Hall v. US Postal Service, 857 F.2d 1073 (6th Cir. 1988)."

The EEOC, the agency charged with enforcement of the Act has promulgated regulations which declare that "the Federal Government shall become a model employer of handicapped individuals". 29 C.F.R. 1613.703 (1987).

The regulations require an agency to make a reasonable accommodation unless it can demonstrate that the accommodation would inmpoose an undue hardship on the operation of its program. 29 C.F.R. 1613.703. The Court of Appeals erred by failing to impose this requirement on the IRS.

Instead, the Sixth Circuit Court of Appeals placed the

affirmative duty of checking the bulletin board for promotional opportunities on the employee. When the Court of Appeals held the IRS had to do nothing more than its usual policy of posting openings, it failed to find that any other accommodation, such as mailing notices, would constitute a burden on the agency.

IRS policy does not affirmatively ensure that handicapped individuals on workers compensation leave are apprised of their right to compete for promotions, or of promotional opportunities. This policy, applied across the board to all workers compensation recipients does not afford them the same opportunities as non-injured workers. IRS has fallen short of the EEOC "model employee" mandate, by failing to take several steps to comply, IRS merely had to:

a. Develop a form detailing the injured workers' rights and give it to the worker when the worker was approved for or workers

compensation.

b. Mail a copy of the job postings to the injured workers.

Given the highly computerized operation of IRS, such a program would be relatively simple and easy to implement and administer.

The ruling of the Sixth Circuit Court of Appeals conflicts with the Rehabilitation Act, prior rulings of other circuit courts, prior rulings of the 6th Circuit, and administrative regulations.

3.) **The Respondent's ouster of Petitioner, by an invalid involuntary disability retirement, precluded Petitioner from receiving notice of promotional opportunities afforded similarly situated employees who were not involuntarily retired.**

The record establishes that notices of promotional opportunities were posted on a bulletin board at the

workplace. There is no question that Petitioner's involuntary disability retirement terminated his access as an employee to the workplace. Unlike his able-bodied co-workers who could periodically and freely check for posted notices on site, Petitioner was no longer on site.

The Court of Appeals overlooked completely the fact that the invalid involuntary retirement, itself, constituted an ouster of Petitioner from free access to the same information provided to employees who were not involuntarily retired on the basis of disability. That was differential treatment.

Even where employees are, at minimum, on site the diminishment of their ability to see postings put in other departments is held to be evidence of discriminatory misconduct. e.g., Wells v. Meyers Bakers, 561 F.2d 1268, 15 FEP Cases 930, 932 (8th Cir. 1977). In Wells, supra at 932, the employer's placement practices diminished black

employee promotional opportunities by shutting off access to postings:

> "Vacancies in PSS were posted in the employees' lounge, but vacancies in maintenance and transportation were posted only within the respective department areas, which were generally off limits to PSS employees. This system greatly diminished the opportunity of a black employee with seniority assigned to PSS to bid on a vacancy in another department."

What more of a lock-out or off-limit diminishment to Petitioner's right to equal access to postings could there be than a complete ouster from the workplace, itself, by involuntarily retirement? By the very act of involuntary retirement, Petitioner was denied equal opportunity to see promotional opportunities that able-bodied workers at work were free to see. By greater opportunity of access, able-bodied workers had, as well, greater opportunity to take expeditious action.

The key to the lack of notice of promotional opportunity claimed by Petitioner is lack of equal access to promotional opportunity postings. The Court of Appeal's finding that Petitioner "failed periodically to check the posted notices" presumes that Petitioner was at work and had free access to perform that simple function. That presumption coupled with the Court of Appeal's failure to consider the unequivocal fact that Petitioner was involuntarily absent from the work site is reversible error.

CONCLUSION

Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: June 7, 1992

(2)

91-2062

Supreme Court, U.S.
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In the Supreme Court of the United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

_____/

Petitioner's Supplemental Brief

Petition for Writ of Certiorari

to the

United States Court of Appeals for the
Sixth Circuit

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Previous decisions of the Merit Systems Protection Board and of other courts conflict with the standard applied by the courts reviewing Petitioner's case below. Other courts have consistently held that the burden is the agency's, not the employee's, to achieve compliance with the re-employment and promotion provisions at issue. Indeed, the same provisions apply to both veterans of the armed forces and to handicapped worker[1], and the decisions have, time and again, focused on the agency's duty to inform the employee, and to furnish every mechanism to facilitate compliance. The courts below failed to acknowledge or to apply this standard, and instead, improperly reversed it and placed the burden on Petitioner. This is contrary to law and to the holdings of

---

[1] Petitioner is a qualified handicapped person under the Act, and the District Court did not rule otherwise.

other courts and of the Merit System Protection Board. See, e.g., Gavette v Department of Treasury, 44 M.S.P.R. 166 (1991); Metropolus v United States Postal Service, 33 M.S.P.R. 536 (1987); Whitefield v United States Postal Service, 5 M.S.P.R. 239 (1981).

In Shiflett v. United States Postal Service, 839 F.2d 669, 674 (Fed. Cir. 1988), the US Court of Appeals for the Federal Circuit found good cause for the Appellant's late failing of her appeal. The Court held that the critical and controlling facts, once an agency fails to provide an employee with the required notice of appeal rights, is not whether the Appellant acted with due diligence when she became aware of her appeal rights, but rather, " the flagrant violation of the regulations by the respondent in failing to give the Petitioner notice of her appeal rights in the form and manner prescribed

by the regulations " at any time prior to the filing of the appeal.

Therefore, applying Shiflett, even if Petitioner failed to file an interest card, it does not defeat his right to promotions, because of the IRS's violation of the regulation requiring that it tell him of his promotional rights in the first place[2].

Consistent with this, in Hetrick v. The Department of Interior, 39 M.S.P.R. 426 (1989), the Merit Systems Protection Board excused the lateness of the employee's request for restoration, by three and a half years beyond the regulatory time limit, because the agency failed to provide the employee with notice of the right to request restoration

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[2] These rights are effective immediately when the employee leaves work because of a compensable injury, unless the agency controverts the claim. F.P.M. Subchapter 2-6.

following recovery from a compensable injury. This is the same provision, 5 CFR Section 353.106, which is in dispute in the case at bar.

The rights of a member of a military to be restored to employment are protected under the same provisions as for persons injured and placed on workers compensation. In Hetesler v. The Department of the Air Force, 24 M.S.P.R. 150 (1984), the Merit Systems Protection Board held that the agency made insufficient effort to locate the employee to send him information concerning a position. This militates against the concern expressed by the Sixth Circuit in the case at bar, when, at oral argument, where it decried the burden on the agency involved in sending notices of promotion openings.

This same duty was applied, in Cox v. U.S. International Trade Commission, 6 M.S.P.B. 287 (1981), to hold that any burden incurred by the agency to make a

position available for the exercise of restoration rights was defeated by the right of the employee who was not responsible for the delay.

Phillips v. Department of Transportation, 22 M.S.P.R. 223 (1984), in considering the same issue, held that nothing in the regulation indicated that an agency may limit consideration to the region in which in the employee was formerly located. See also, Andrews v. Department of Air Force, 47 M.S.P.R. 233 (1991)(An agency was required to provide a mechanism for considering employees for promotion who were absent due to military duty.) Therefore, the courts below erred in not finding that IRS's failure to provide such a mechanism violates this provision.

In addition, the decision below conflicted with that in Cobb v. Prokop, 557 F. Supp. 391 (D. Mass. 1983). This case, arising under the Veteran's Reemployment Rights Act of

1974, 38 U.S.C. Sect. 2021 et seq., rejected the decisions below holding that Plaintiff's appeal of improper restoration (and failure to promote her) exceeded the 15-day limitation period in 5 C.F.R. Sect. 353.401(a)(iv)(1976).

The language setting forth reemployment rights in the Veteran's Act is redolent of that in the case at bar, providing for such rights as

> "the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment." 38 U.S. Sect. 2021(b)(2).

Indeed, the Cobb court cited 5 C.F.R. Sect. 353.201(a), the provision in dispute at bar, and found that this regulation mandated careful scrutiny of the findings below. 557 F. Supp. at 396.[3] The Court found error in imposing on

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[3] This decision was an appeal from the M.S.P.B.

Plaintiff the burden of discovering whether a vacancy existed.

> "The Act charges the V.A. with an affirmative obligation to consider for promotion those employees who had been absent from duty because of military service. Even if Cobb had never inquired about the opening in question here, the VA would, nonetheless, have had the affirmative obligation to consider her for promotion to an existing vacancy." 557 F. Supp. at 396.

The Court found improper the failure to notify Plaintiff of the existence and availability of positions to which she may have been eligible for promotion. Because Cobb, as did Plaintiff at bar, did not have reason to believe that pursuit of employment opportunities would be successful, the Court found that she exercised due diligence under the circumstances of that case. This is of course contrary to the standard applied by the courts which reviewed the case at bar, which imposed the standard on Petitioner, not the Agency. Those courts additionally ignored the mandate of 5 C.F.R.

Sect. 353.107, which requires the agency to "maintain the necessary records to assure that all such employees [injured or on military duty] are preserved the rights and benefits granted by law". The record of the Sixth Circuit Court of Appeals' questions reflects a focus on burden to the agency, both in terms of record-keeping and providing these promotion rights. However, a Court may not second-guess the legislative determination that our veterans and the handicapped are both entitled to specific promotion and re-employment rights.

It is the agency's burden to provide the employee with relevant information to permit him to proceed with promotions. It was not Petitioner's responsibility to figure out that he was eligible for promotions, and that he had to fill out an interest card to obtain one. Indeed, the failure to provide Petitioner with promotion information contravened the

requirement that the handicapped worker be treated as if he were employed.

It is further the agency's burden to show it has made all reasonable efforts to comply with these requirements, as to re-employment rights[4], and as to promotions. See, e.g., Harrison v. Marsh, 46 F.E.P. Cases 971 (W.D. Mo. 1988).

> "[A]gency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law." Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L.Ed.2d 270, 292 (1974)(citations omitted).

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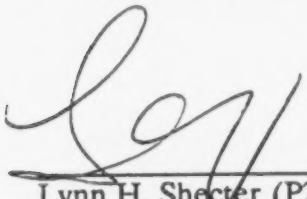
[4] Indeed, whether an employee knew that he had to satisfy certain procedural requirements, i.e., in the case at bar, to file an interest card, is a question of fact that renders improper a grant of summary judgments. Thornhill v Marsh, 49 FEP Cases 6 (9th Cir. 1989).

Accordingly, Petitioner's request for a writ of certiorari should be granted.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.



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(3)

91-2062

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In the Supreme Court of the
United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

Appendix in Support of Petition
for Writ of Certiorari

to the

United States Court of Appeals
for the Sixth Circuit

Volume I

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APPENDIX

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UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

v.

Civil Action No.
89-CV-71021-DT

SECRETARY OF UNITED STATES
DEPART OF TREASURY;
INTERNAL REVENUE SERVICE,

Defendants.
_____/

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Monday, December 17, 1990.
APPEARANCES:

ROY, SHECTER & VOCHT, P.C.
Suite 302
877 S. Adams
Birmingham, Michigan 48009
(By William A. Roy, Esq.)

Appearing on behalf of Plaintiff Charles E. Gavette

APPEARANCES (Continued):

FRANCIS L. ZEBOT, Esq.
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and

JOHN A. FREEMAN, Esq.
Assistant IRS District Counsel
Internal Revenue Service
Cincinnati, Ohio 45202

of counsel

Appearing on behalf of Defendants Secretary of United States Department of Treasury and Internal Revenue Service

Detroit, Michigan
Monday, December 17, 1990

- - -

THE CLERK OF THE COURT: Docket No. 89-71021, Gavette v Internal Revenue Service.

MR. ROY: Your Honor, William A. Roy, Roy, Shecter Vocht, on behalf of Charles E. Gavette.

MR. ZEBOT: Frank Zebot on behalf of the Secretary and with me is John Freeman, Assistant District Counsel.

THE COURT: Gentlemen, as I understand this, all of the claims that Mr. Gavette makes in this case were presented to the Merit System Protection Board is that a fair statement, at one time or another in an administration proceeding?

MR ROY: Your Honor, I don't

believe that the claims that he made with respect to the dates from 1979 to 1982 were in there.

THE COURT: Mr. Zebot says that initially those claims were made to the Hearing Officer and abandoned when an appeal was taken from the Hearing Officer to the Merit System Protection Board, do you not, Mr. Zebot?

MR. ZEBOT: Yes, your Honor.

THE COURT: If that's the case, and the Merit System Protection Board ordered relief, and the Internal Revenue Service said we complied with the order, the argument really is over whether or not there was compliance, is that a fair statement?

MR. ROY: Yes, your Honor.

MR. ZEBOT: Yes, your Honor.

THE COURT: It seems to me that whether or not there was compliance, there is a procedure established by law for allowing for the Merit System Protection Board to determine whether or not there was compliance and nobody has taken that, and, as I read the regulations, you must do it within 30 days, if you do it longer then ,30 days you have to she good cause for the delay, is that a fair statement?

MR. ZEBOT: I believe it is, your Honor, from our point of view.

MR. ROY: I don't know whether that's a fair -- I know that's a fact. But there's a procedure for that and we're saying we were already there.

THE COURT: If you both sit down, I have a short memo I'm going to read into the record.

MR. ZEBOT: Thank you, your Honor.

THE COURT: These are the Court's findings on the cross motions for summary judgment.

1. Plaintiff was disabled from 1971 to 1982 and January, 1985-1986.

2. Plaintiff claims he was disadvantaged during these periods because he was a) not notified of promotional rights and b) not considered for promotion. Plaintiff says that these failures constitute handicap discrimination and age discrimination in violation of 5 U.S.C. 8151.

3. Pursuant to 5 C.F.R. 353.401,

Plaintiff appealed to the Merit System Protection Board. See 5 U.S.C. 7701(a).

4. Appeals from decision of the Merit System Protection Board are to be taken to the District Court when discrimination is claimed. 5 U.S.C. 7703(b)(2).

5. If the Merit System Protection Board. does not act within 30 days, an action may be filed in the District Court. 5 U.S.C. 7702(e)(1)(B). This apparently does not divest the Merit System Protection Board of jurisdiction. McGovern v E.E.O.C., 28 M.S.P. 3689.

6. The Court waited -- Plaintiff instituted a suit in this Court prior to

a decision by the Merit System Protection Board. The Court has waited for the decision of the Merit System Protection Board before acting on Defendants' Motion for Summary Judgment.

7. On March 8, 1990 the Merit System Protection Board decided the case. It considered a) failure of the IRS to inform Plaintiff of his 5 restoration rights, b) the IRS improperly failed to restore Plaintiff to duty by not promoting Plaintiff to a GS-13 "CEP Team Coordinator" position, and discriminated against Plaintiff on the basis of age and handicap. The decision of the Merit System Protection Board describes generally the background of the relationship between Plaintiff

and the IRS.

8. In the process of taking his case to the Merit System Protection Board, Plaintiff abandoned claims of mistreatment for 1979-1982.

9. The Merit System Protection Board's decision required the IRS to a) consider Plaintiff nationwide for restoration positions at the GS-13 grade level or higher, for which he would have been considered had he been present from January 25, 1985 (the date of his disability) to the date he was permitted by the IRS to return to work, b) the IRS was required to identify positions on a nationwide basis retroactive from January 25, 1985 to the date Plaintiff returned to work, and c) the IRS was to

determine
whether Plaintiff was qualified for these positions based on his recovery from his emotional illness.

10. On March 28, 1990 the IRS notified Plaintiff it would comply with the Merit System Protection Board decision, but since it appeared Plaintiff never submitted an Application for Promotion/Reassignment Form 4536 during the applicable period, a requirement of the IRS's merit promotion plan, it was unlikely Plaintiff could be considered for promotion.

11. On May 7, 1990 the IRS notified Plaintiff he was not eligible for promotion since he did not fill out and file the Form 4536 during the period

January 25, 1985 through July 5, 1988. The IRS said it had complied with the Merit System Protection Board Order of March 6, 1990 by such action.

12. Plaintiff does not contest the IRS position administratively. He had 30 days after service of the notice of full compliance (May 7, 1990) to petition for enforcement. 5 C.F.R. 1201.82. It appears also under the applicable provisions of the Code of Federal Regulations that the 30 day period may be extended by the Merit System Protection Board.

13. Failure to raise the issue of non-compliance with the Merit System Protection Board may constitute abandonment of his claim. See Lizut v

Department of the Army, 717 F.2d 1391, Court of Appeals, Federal Circuit 1983.

14. Additionally, there is nothing in the record to suggest the IRS treated on-the-job employees any differently then those on disability leave regarding promotional opportunities. All employees, it appears, are required to have on file a Form 4536 to be considered for promotion.

15. Whether or not the action of the IRS complies with the orders of the Merit System Protection Board is for the Merit System Protection Board in the first instance to determine.

Accordingly, Plaintiff's Motion for Summary Judgment is denied.

Defendants' Motion for Summary

Judgment is granted without prejudice to the rights of the Plaintiff to apply to the Merit System Protection Board for further relief regarding enforcement of its order.

The Court notes the voluminous filing of papers and exhibits, and failure of the parties to identify with particularity the particular provisions of such papers and exhibits applicable to their argument, as well as failure to identify with particularity the issues that were really in contest.

You may prepare an appropriate order,Mr. Zebot.

MR. ZEBOT: Thank you, your Honor.

MR. ROY: Thank you, your Honor.

THE COURT: I suppose I should make

the observation, that after going back to the Merit System Protection Board Plaintiff is dissatisfied, presumably he would then have the right to appeal again to this Court from any action it takes, and under the local rule either this case could be reopened or the new case would be assigned to this Judge.

MR ROY: Thank you very much, your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

CIVIL NO.
89-CV-71021-DT

vs

HONORABLE AVERN COHN
SECRETARY OF UNITED STATES
DEPARTMENT OF TREASURY;
INTERNAL REVENUE SERVICE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On January 31, 1990, defendants filed their motion to dismiss or for summary judgment or, in the alternative; to hold in abeyance plus brief and supporting papers. Plaintiff filed his answer to the motion (dated March 6, 1990) plus brief and supporting

papers. On March 14, 1990, defendants filed their reply brief plus supporting papers. Plaintiff filed his supplement to answer (dated March 14, 1909). On April 20, 1990, plaintiff served his motion to permit filing a motion for partial summary judgment on liability plus brief and supporting papers. On May 4, 1990, defendants filed their response and brief in opposition to plaintiff's motion plus supporting papers. On September 4, 1990, defendants filed their supplemental motion to dismiss or for summary judgment plus brief and supporting papers. On September 25, 1990, plaintiff served his motion for summary judgment on issue of liability plus brief and supporting papers. On

October 9, 1990, plaintiff served his answer to defendants' supplemental motion. On October 19, 1990, defendants filed their (1) response and brief in opposition to plaintiff's motion for summary judgment on the issue of liability and (2) reply brief (to plaintiff's answer to defendants' supplemental motion).

Hearing on the cross motions was held on December 17, 1990, both parties appearing through counsel.

For the reasons stated on the record in open court, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted without prejudice to

plaintiff's ability to apply to the Merit Systems Protection Board (MSPB) by way of petition for enforcement of the MSPB's March 6, 1990 Order.

Let judgment enter accordingly.

_____

AVERN COHN
U.S. DISTRICT JUDGE

Dated: Dec 19 1990

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

CHARLES E. GAVETTE, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBERS CH03538810382 Date: August 19, 1988

Lynn H. Shecter, Esquire, Roy, Shecter & Vocht, P.C., Birmingham, Michigan, for the appellant.

John A. Freeman, Esquire, Cincinnati, Ohio for the agency

BEFORE

Gregory A. Miksa
Administrative Judge

INITIAL DECISION

INTRODUCTION

By petition filed April 19, 1988,

appellant Charles Gavette submitted an appeal to the Board in which he contends that the agency violated his restoration to duty rights by denying him appropriate reinstatement on March 30, 1988, following his recovery within one year from a recurrence of a compensable work related illness (Record tab 1, Exhibit A to appeal).

TIMELINESS AND JURISDICTION

The agency initially moved that the appeal be dismissed based on timeliness and jurisdictional grounds. Specifically the agency contended that the appeal was barred by a March 11, 1988 formal complaint of discrimination and that the issues raised by the appeal were moot based on a June 1, 1988 settlement agreement in a separate proceeding previously initiated by appellant in the Federal District Court for the Eastern District of Michigan (Record tabs 3 and 9).

The issues raised in the agency's motion were addressed by the undersigned administrative judge in Orders dated July 8, 1988, and August 2, 1988, in

which I denied the agency's motion to dismiss. I have specifically found that appellant's April 19, 1988 appeal from the agency's denial of his October 13, 1987 restoration to duty request is both timely and subject to the Board's appellate jurisdiction. I have found that the June 1988 court settlement expressly preserved appellant's independent right to seek relief before the Board in this case for the alleged denial of his rights under 5 U.S.C.A. 8151 (West 1980) subsequent to the initiation of his separate discrimination suit. See 5 U.S.C.A. 7701(a) and 8151(b)(1); and 5 C.F.R. 353.401 (1988).

The agency representative

subsequently filed an August 9, 1988 motion requesting correction of a stipulated fact underlying my determination concerning the date of the agency's alleged response to appellant's March 11, 1988 formal discrimination complaint. The agency representative agreed on July 27, 1988 that the agency responded to appellant's March 11, 1988 formal complaint of disorientation on or about March 31, 1988. The agency states that it did not respond to appellant's March 11, 1988 formal discrimination complaint, but it has nevertheless agreed to the timeliness of appellant's appeal.

Appellant has not responded to the agency's motion to correct the record

concerning the existence of an agency response to appellant's March 11, 1988 formal discrimination complaint. Since it is clear, however, that the agency's denial of appellant's restoration to duty request was not issued until March 30, 1988, I find that appellant's March 11 1988 formal complaint of discrimination could not have covered the issues raised by appellant's instant appeal from that denial. I Find that the appeal is, accordingly, within the Board' 5 jurisdiction and timely under the Board's regulations. See 5 C.F.R. 1201.154(c) (1988).

STIPULATED FACT AND ISSUE

By stipulation in a telephone conference call with the party

representatives on August 1, 1988, the appellant waived his request to a hearing and the agency representative concurred in appellant's request to have the remaining stipulated issue in this case adjudicated on the record. The parties further stipulated that the sole remaining issue for adjudication in this appeal concerns the agency's possible denial of appellant's promotion rights, provided under 5 U.S.C.A. § 8151(b)(1) (West 1980) based on his recovery in under one year from the disability For which he received compensation, commencing on January 25, 1985 and terminating on January 8, 1986. This stipulation does not affect, however, adjudication of appellant's affirmative

defenses of age and handicap discrimination which has addressed by the parties in their final submissions to the Board.

The party representatives further stipulated during the August 1, 1988 telephone conference call that all promotions possibly at issue concern positions for which appellant would have been required to bid competitively. The also stipulated that appellant has been restored to duty at the GS-12, step 10, journeyman level for his Revenue Agent position, the position, grade and step he would have achieved if he had remained in his pre-disability position during his absence (See Record tab 15, Exhibit 9, Stipulation for Compromise

Settlement).

Accordingly, this initial decision is based on the written submissions and the documentary evidence submitted by the parties on or before the close of record date. For the reasons stated below, I find that the agency has not demonstrated that it has satisfied appellant's right to be considered for all promotions for which he would have been eligible as required under 5 U.S.C.A. § 8151(b)(1) and its March 30, 1988 denial of restoration is REVERSED as to this issue.

ANALYSIS AND FINDINGS

Background

In September 1979, the agency initiated action to obtain worker's

compensation benefits for appellant based on an emotional illness caused or aggravated by appellant's employment. That application was initially denied by the Department of Labor on April 29, 1981, and it was again denied on August 10, 1982. Subsequently, however, the Department of Labor granted (appellant worker's compensation benefits from August 3, 1979 to May 7, 1982 (Record tab 15, Agency Exhibits 1 through 3).

The agency also applied for disability retirement on appellant's behalf in 1980 with the Office of Personnel Management [OPM] This action that was opposed by the appellant and initially denied by OPM in April 1981.

On June 22, 1981, the agency filed a request for reconsideration with OPM, and OPM granted the agency's request for appellant's disability retirement in February 1982. Although appellant requested a copy of the agency's reconsideration request and supporting documentation from the agency in June 1981, this material was not furnished to appellant until March 1982, after OPM had granted the agency's reconsideration request. Appellant appealed the OPM decision to the Board and the Board sustained the OPM decision to grant appellant involuntary disability retirement.

The above facts concerning

appellant's disability retirement were set forth in a decision by the United States Court of Appeals for the Federal Circuit in Gavette v. Office of Personnel Management and the Department of Treasury, Appeal No. 84-1282 (Fed. Cir., February 1, 1985) (unpub.) (Record tab 18, Exhibit A). In that decision, the court reversed the Board's determination concerning the propriety of OPM's disability determination. Furthermore, the court criticized, on due process grounds, the respondent agency's refusal to provide copies of its reconsideration request and supporting documentation to appellant prior to OPM's reconsideration decision. The court also specifically determined

that the agency committed harmful procedural error when, in response to a psychiatric fitness-for-duty examination of appellant ordered by the agency in 1979 the agency failed to certify that transfer of appellant in accommodation of appellant's emotional illness was impossible. The court noted that this accommodation was recommended in the 1979 and 1980 fitness reports of board certified psychiatrist, Dr. Warren W. Goodwin.

As noted by the court in its decision, appellant initially sought to have the court reinstate him to his previous position at the agency to remedy the agency's harmful error. Appellant represented to the court in

oral argument, however, that he preferred to remain in the status of a disabled employee at the time of the court's decision. The court, accordingly, remedied the situation by remanding the case to the Board with instructions "that [appellant] be awarded the difference between the salary he would have received had he remained on active duty and the disability retirement pay he has received to the date of judgment and any other relief to which he is entitled in accordance with this opinion, less any earnings he has received from other employment in the interval." (Record tab 18, Exhibit A, page 12) (Emphasis supplied).

On December 23, 1985, appellant applied to the Department of labor claiming worker's compensation benefits for a recurrence of his emotional illness beginning in January 1985. This application was supported by a report from Dr. Goodwin, dated January 20, 1986. Dr. Goodwin's stated in this report that appellant was incapacitated for work from January 25, 1985 through approximately January 8, 1986 as a result of emotional illness experienced by appellant in part due to proceedings before the Court of Appeals for the Federal Circuit concerning his challenge to his involuntary retirement (Record tab 15, Exhibits 4 and 5). Dr. Goodwin's January 1986 report indicates that

appellant was able to fully resume the duties of his position with the agency as of January 8, 1986. On January 27, 1986 appellant applied to the agency for restoration to duty (Record tab 1, Exhibit D). This request was denied by the agency on February 20, 1986 based on appellant's asserted "disabled" status (Record tab 1, Exhibit C). Appellant's December 1985 worker's compensation claim was also initially denied by the Department of Labor on June 24, 1966, and again on October 17, 1986 (Record tab 15, Exhibits 6 and 7). This claim was ultimately granted by the Department of Labor, however, on September 16, 1987. The Department of Labor approved worker's compensation benefits for the

period January 25, 1565 to January 8, 1986 (Record tab 15, Exhibit 8).

Following receipt of the Department of Labor's final decision concerning his compensation claim, appellant immediately renewed his request for restoration to duty by submitting another copy of his January 27, 1986 letter to the agency. The letter was received by the agency on October 13, 1987 (Record tab 1, Exhibit B). Appellant appeals from the agency's March 30, 1986 denial of this restoration request.

Analysis

The applicable statutory provision

under which appellant seeks relief, 5 U.S.C.A. § 8151, states in pertinent part:

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management--

(1) the department or agency which was the last employer shall immediately and

unconditionally accord the employee, if the injury or disability has been overcame within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume, his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, <u>including the right to tenure, promotion and safeguards in reductions-in-force procedures</u>, ... (Emphasis supplied).

In Raicovich v. United States

Postal Service, 675 F.2d 417 (1982), the Court of Appeals for the Federal Circuit stated that in enacting this statutory provision, "Congress sought to accord injured workers treatment equal to that which they would have received but for their injury." Id. at 424.

I find for purposes of this decision that the February 1, 1985 decision of the Court of Appeals for the Federal Circuit concerning the respondent agency's action in seeking appellant's involuntary retirement operated to constructively restore appellant as if he had been actively employed by the agency from May 7, 1982 (when his initial period of compensation ceased) to the date of the court's

judgment. This determination is supported by the Department of Labor's determination that appellant's work related disability ceased as of May 1982, and Dr. Goodwin's January 1986 report showing that appellant could have worked in his previous position with the agency sometime between November 1982 and December 1984 (Record tab 15, Exhibit F).

Concerning the agency's assertions in its final argument for the record that appellant's disability during 1985 is not employment related, I find that the Department of Labor's September 16, 1987 determination that appellant suffered a recurrence of his emotional illness, due to a factor related to his

employment, is not subject to collateral attack in the instant Board proceeding. The Secretary of Labor is exclusively charged, under 5 U.S.C.A. § 8149 (West 1980) with making "final decisions" concerning such employee claims. I, accordingly, find that appellant is eligible for the employment rights afforded a person who demonstrates that he has overcome a compensable disability within one year of commencement of benefits for recurrence of a work related disability under 5 U.S.C.A. § 8151(b)(1). See Hogg v. United States Postal Service, 29 M.S.P.R. 153, 156-157 (1985) (Board has jurisdiction if employee shows that he is eligible for restoration rights under 5 U.S.C.A. §

8151 and alleges that his rights have been violated).

As observed in my August 2, 1988 Order to the parties, the Board held in Metsopulos v. United States Postal Service, 33 M.S.P.R. 536, 539 (1987), that it is the agency's burden to submit evidence regarding available positions (including competitive supervisory positions if at issue) and any restrictive qualifications requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee as required under the statute and OPM regulations. See also Whitfield v. United States Postal Service, 5 M.S.P.R. 239 (1981). I note that the employee's rights in Metsopulos

derived from section 8151(b) (2), not section 8151(b) (1) herein applicable which imposes on the agency the additional specific obligation to show that it has granted employees who recover in under one year their right to promotions. Furthermore, the Board has held that it is the agency's burden to produce specific factual information that an employee's restoration rights were fully granted. See Hogg, at 156-157.

Under 5 C.F.R. § 353.302 (1988) of OPM's regulations governing restoration to duty, an employee who recovers from a disability within one year of commencement of compensation or from the

time compensable disability recurs is entitled to resume his or her former position (or an equivalent position) "immediately" upon cessation of compensation benefits. (Emphasis supplied) Under 5 C.F.R. § 353.201 (1987) of OPM's regulation the agency was required to consider an employee who was "absent" due to a compensable injury for "all promotions" for which he would be considered were he not absent. Although the parties agree that the latter requirement was eliminated from OPM's regulations, effective February 16, 1988 (See 53 Fed. Reg. 353 (January 19, 1988) and Record tab 18, Exhibit D), I find that this requirement is binding on the agency herein in light of its

applicability 1) at the time appellant's benefits ceased, 2) at the time appellant and the agency were notified by the Department of Labor of the status of appellant's December 1985 compensation claim, 3) and at the time of appellant's October 1987 application for restoration.

Concerning the agency's final argument that it had no available promotion opportunities during the period appellant received compensation from the Department of Labor, from January 25, 1985 to January 8, 1986, I find that the agency was responsible to consider appellant for promotion opportunities that became available

after January 8, 1986 through the date of his application for restoration. I base this finding on the absence of any specific restriction in section 353.201 of OPM's 1987 regulations which would limit an employee's consideration for promotions only to the period an employee was in receipt of disability compensation.

Moreover, in Withers v. Department of the Air Force, 28 M.S.P.R. 379, 385 (1985), the Board held that agencies have a duty to both partially recovered and fully recovered employees to consider suitable positions for restoration on a nationwide basis, absent evidence showing circumstances which would make such a job search

inappropriate in a particular case. In the Instant case the agency's argument and evidence shows that it has considered appellant only for promotional opportunities that became available during appellant's absence in the Detroit District of the agency. No other evidence was offered to show what circumstances if. this case would preclude a nationwide search. See also Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227 (1984).

Findings

It is clear from the decision of the Court of Appeals for the Federal Circuit concerning appellant's

involuntary retirement that immediately prior to appellant's initial absence for disability in 1979 (after eighteen (18) years of satisfactory or better service) he had been placed as a GS-12 Revenue Agent on the agency's promotion roster for GS-13 positions with the agency. Although he may not, thereafter, have had a right per se to a competitive promotion, the agency's evidence and argument in this case shows that it has not considered appellant for all such promotion opportunities that arose during his absence from January 25, 1985 to the date he applied for restoration in October 1987. I therefore find that the agency has failed to establish, by preponderant evidence, that it has fully

complied with the provisions of section 8151(b) (1) of the statute and applicable OPM regulations by 1) granting appellant his right to consideration for all promotional positions for which he would have been competitively considered but for his absence because of a compensable disability, and restoring him to an acceptable Grade 13 or higher position consistent with his qualifications and the agency' s merit promotion policy effective on the date of his application for restoration (Record tab 18, Exhibit D, OPM letter to appellant concerning agency's obligation to consider restored employee's for promotion under its i987 regulations). See Cox v. United States

International Trade Commission, 15 M.S.P.R. 455, 458–459 (1983).

AFFIRMATIVE DEFENSES

Appellant generally asserts that the agency's denial of a promotion that he would have received during the period of his absence from work on an after January 25, 1985 constitutes age and handicap discrimination in violation of 5 U.S.C.A. §§ 2302(b)(B) and (D) (West Supp. 1988). The burden is on appellant to prove by a preponderance of the evidence the validity of any affirmative defense raised. 5 U.S.C.A. § 7701(c)(2)(B) (West 1980); 5 C.F.R. § 1201.56(b) (1988).

The criteria necessary to establish

a prima facie case of age discrimination in violation of sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C.A. §§ 631 and 633a [West 1985]) include 1) that appellant is in the protected age group, 2) that he received treatment not accorded those outside the protected age group, and 3) that consideration of age was a factor in the decision to take the action from which the appeal was filed. See Mahurin v. Department of the Air Force, 4 M.S.P.R. 302, 305 (1980).

Although appellant, who is currently fifty-five years of age, is in the protected age group, he has not produced sufficient evidence to show

that he has been accorded treatment not accorded those outside his protected age group, or that age was a factor in denying him any restoration right under 5 U.S.C.A. § 8151. I, accordingly, find that appellant has not sustained, by preponderant evidence, his charge that the agency's failure to accord him his full rights under the statute is the result of age discrimination.

Concerning appellant's claim of handicap discrimination, appellant must establish that he is a "qualified handicapped person" under 29 C.F.R. § 1613.702(f) (1987), and that the agency has failed to accommodate his handicapping condition. Appellant may show that he is a qualified handicapped

person if he demonstrates that he is a handicapped person within the meaning of 29 C.F.R. § 1613.702(a), and if he articulates a reasonable accommodation under which he can perform the essential functions of his claimed position without endangering the health and safety of himself or others. In order to establish a prima facie case of discrimination, appellant must also establish a causal connection between his handicapping condition, and the conduct that he charges constitutes discrimination. See Conti v. Department of the Army, 34 M.S.P.R. 272, 277 (1987); and Milled v. Department of Health and Human Services, 23 M.S.P.R. 128, 132-134 (1984), aff'd, 770 F.2d 182

(Fed. Cir. 1985). Once a prima facie case of discrimination is established, the burden of going forward with the evidence, but not the ultimate burden of persuasion, shifts to the agency to demonstrate that its action was based on some legitimate non-discriminatory reason. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 892 (1973). If the agency's reason is sufficient to rebut the prima facie case of discrimination, the appellant is afforded the opportunity to demonstrate that the reason for failing to accommodate the handicapping condition is pretextual. See Stalkfleet v. United States Postal Service, 6 M.S.P.R. 637, 647-48 (1981).

In this case the record shows that

appellant has both a history of suffering from employment related and disabling emotional illness which was also perceived by the agency as limiting a major life activity, appellant's ability to work. Furthermore, the record shows that the agency acted on this perception by filing for disability retirement on appellant's behalf. I, accordingly, find that the evidence of record establishes that appellant is a handicapped employee within the meaning of 5 C.F.R. § 1613.702(d) and (e) (1987).

Appellant generally contends in his final submission to the Board that he has been discriminated against by virtue

of the agency's denial of an immediate promotion to the position of "CEP Team Coordinator," a GS-13 position (Record tab 18, page 9). Appellant further contends in an unsigned affidavit attached to, his August 16, 1588 submission, that in 1979 he had been "promised the next available promotion" (Record tab 18, Exhibit G, attached affidavit). This statement is somewhat contradicted, however, by the February 1985 decision of the Court of Appeals for the Federal Circuit which noted that although appellant had been placed on a promotion roster as a GS-12 Revenue Agent, he had been forced to grieve his placement on the bottom of this roster (Record tab 18, Exhibit A).

It is unclear from the record whether appellant's grievance resulted in a determination to place appellant in a GS-13 position. Appellant, moreover, produced no information showing the performance requirements for the GS-13 Team Coordinator position. Nor did he provide information showing his current qualifications for, and ability to perform, the duties of the position. I, accordingly, find that appellant's allegations are insufficient to show, by preponderant evidence, that appellant is able to perform the duties of the Team Coordinator GS-13 position, with or without reasonable accommodation and without endangering the health and safety of himself or others.

Accordingly, I do not find that appellant has established a prima facie case of discrimination on this record by virtue of the agency's previous failure to appoint him to this position, and his allegation of discrimination is, accordingly, not sustained.

I further find that any other issues of discrimination that pertain to the agency's asserted inappropriate refusal to employ appellant, apart from appellant's generally claim to a promotion under 5 U.S.C.A. § 8151(b) (1) were resolved in the June 1988 settlement agreement which resulted in appellant's reinstatement as a Revenue Agent, GS-12, Step 10 with the agency in July 1988.

My determinations concerning appellant's affirmative defenses, however, should not be construed to foreclose the agency from considering and, if appropriate, appointing appellant to the claimed GS-13 CEP Team Coordinator position if appellant's actual qualifications, and/or any previous grievance settlement, provide him a right to this position pursuant to 5 U.S. C.A. § 8151(b) (I) applicable OPM regulations, and the Order I have stated below.

DECISION

The agency's determination to deny appellant consideration for competitive

promotions, nationwide, during the period of his absence from January 25, 1988 to October 13, 1987 is REVERSED.

ORDER

The agency is hereby ORDERED to consider appellant pursuant to 5 U.S.C.A. § 8151(b) (1) and 5 C.F.R. § 353.201 (1987), for; restoration to any position at Grade 13 level or higher for which he would have been considered if he had been present from January 25, 1985 to October 13, 1987. The agency must therefore, identify positions on a nationwide basis retroactive to January 25, 1985 and continuing through October 13, 1987 for which appellant would have been eligible to compete for promotion, and to determine whether appellant was

qualified based on his fully recovered status from his disabling emotional condition through October 13, 1987. The agency is further ORDERED to make every effort to restore appellant to an acceptable higher graded position if such restoration would be in accord with the agency's merit promotion plan (See Record tab 18, Exhibit D, OPM letter to appellant dated April 15, 1988). Proof of compliance with this decision must be submitted to this office within twenty (20) days after this initial decision becomes a final decision of the Board. See Withers v. United States Postal Service, 28 M.S.P.R. 379, 385.

The agency is also ORDERED to issue, if appropriate, a check to

appellant for the appropriate amount of back pay and benefits in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency in furtherance of compliance.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this

initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the age about its intentions.

FOR THE BOARD: _____
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on SEP 23 1988 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must

file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either

mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for

judicial review of both discrimination and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be <u>received</u> by the court

of appeals no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no' later than 20 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the enclosed Decision was sent by regular mail this date to each of the following:

Appellant

Mr. Charles E. Gavette
6816 Blue Grass
Clarkston, Michigan 48016

Appellant's Representative

Lynn H. Shecter, Esquire
Roy, Shecter & Vocht, P.C.
877 S. Adams, Ste 302
Birmingham, Michigan 48011

Agency's Representative

John Freeman, Esquire
Department of the Treasury
Internal Revenue Service
550 Main. Street, Room 6108
Cincinnati, Ohio 45202

Other

Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7623
Washington, D.C. 20415

August 19, 1988
(Date)

Pat DuBrock
Legal Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES E. GAVETTE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL
	)	FROM THE
INTERNAL REVENUE SERVICE,	)	UNITED
	)	STATES
Defendant-Appellee,	)	DISTRICT
	)	COURT FOR
	)	THE
	)	EASTERN
	)	DISTRICT
	)	OF MICHIGAN

DECIDED AND FILED _____

BEFORE: NORRIS and SILER, Circuit Judges; and WELLFORD, Senior Circuit Judge.

PER CURIAM. Plaintiff Charles Gavette, appeals from the order of the district court granting summary judgment to defendant, Internal Revenue Service ("IRS"). In his complaint, plaintiff alleged, in essence, that the IRS failed

to notify him of re-employment and promotion rights in violation of federal laws prohibiting discrimination on the basis of age and handicap, resulting in loss of promotion and career opportunities.

The plaintiff filed all of his grievances, at one time or another, with the Equal Employment Opportunity Commission (EEOC) agency and the Merit Systems Protection Board (MSPB). The EEOC agency denied him relief on all counts and notified the plaintiff of his right to sue in district court. After the plaintiff filed with the MSPB, the MSPB ruled in his favor in certain respects and rendered a final decision in the matter on March 8,

1990. The defendant complied with the MSPB order and notified the plaintiff of its substantial compliance on May 7, 1990, and the plaintiff did not contest that compliance in a timely manner.

In granting summary judgment to the defendants, the district court held that, as to the MSPB process it had no subject matter jurisdiction to hear any matters concerning the defendant's compliance with the MSPB order because the plaintiff had not first appealed to the MSPB. The court further held that there was no evidence in the record of discrimination against this plaintiff. This court will address that part of the district court's opinion holding that there was no evidence of discrimination.

With respect to this holding, the district court noted:

> [T]here is nothing in the record to suggest the IRS treated on-the-job employees any differently then [sic] those on disability leave regarding promotional opportunities. All employees, it appears, are required to have on file a Form 4536 to be considered for promotion.

---

1 There was some confusion to whether the plaintiff challenged the decision of the EEOC agency or the MSPB in the district court. Under C.F.R. 1613.403, a plaintiff may filed a "mixed case complaint" with the appropriate EEOC agency or the MSPB, but not both. This plaintiff chose to follow both avenues of relief and was apparently allowed to proceed in both fora. the plaintiff's complaint, it appears that he is suing pursuant to his right to sue letters from the EEOC agency. In open court, however, the plaintiff's counsel agreed that the only issue on appeal was as to the defendant's compliance with the MSPB order. Because the district court addressed the results of both fora, this court is not is not obligated

to decide which course of conduct should have been followed.

. . . .

> The Court notes the voluminous filing of papers and exhibits, and failure of the parties to identify with particularity the particular provisions of such papers and exhibits applicable to their argument, as well as failure to identify with particularity the issues that were really in contest.

Our examination of the record on appeal leads us to agree with the district court's conclusion that none of plaintiff's filings satisfied his burden to respond to defendant's motion for summary judgment, as required by the Celotex trilogy of cases and its progeny. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) Anderson v Liberty

Lobby. Inc. 477 U.S. 242 (1986); Matsushita Electric Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986) We review a grant of summary judgment de novo. McAdoo v. Dallas Corp., 932 F.2d 522, 523 (6th Cir. 1991) Inferences are drawn in a light most favorable to the non-movant, but "summary judgment may be granted where the evidence is merely colorable or is not significantly probative." Id. at 524.

On appeal, plaintiff points to some evidence that he says demonstrates that he was the victim of disparate treatment--that, as a handicapped person, he Did not receive notifications afforded able-bodied employees. However, that is not the theory upon which

plaintiff proceeded in the trial court. There, he argued that IRS' failure to follow notification requirements was, ipso facto, discriminatory. He supported his argument with a small portion of the deposition of Sharon Hays, a personnel staffing specialist of the defendant, which indicated that she never personally notified individuals who were absent from work on workers' compensation of promotion opportunities. Plaintiff argued that handicapped persons were not advised of their rights, hut did not point out evidence demonstrating that on-the-job able-bodied employees received that advice. The defendant did, in fact, post notices on a bulletin board at the

workplace giving information as to when certain jobs were open and when it planned to hire. The plaintiff failed periodically to check the posted notices or call the office of personnel management for promotion information.

Accordingly, because the plaintiff did not posit to the district court a viable theory of discrimination supported by summary judgment evidence, we hold that the district court did not err in reaching its decision. The judgment of the district court is accordingly **AFFIRMED.**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

CHARLES E. GAVETTE

Plaintiff,

v

89-CV-71021-DT

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY;
INTERNAL REVENUE SERVICES,

Defendants.

DEPOSITION OF SHARON HAYS

The discovery deposition of Sharon Hays, taken before me, Marcia M. Muonio, Notary Public and Court Reporter acting in the County of Oakland, State of Michigan, on Wednesday, March 7, 1990, at 877 South Adams, Suite 302, Birmingham, Michigan 48009, commencing at about 12:45 p.m.

APPEARANCES: LYNN H. SHECTER
877 South Adams, Suite 302
Birmingham, Michigan 48009
Appearing on behalf of the
Plaintiff.

FRANCIS L. ZEBOT
817 Federal Building
Detroit, Michigan 48226
Appearing on behalf of
the Defendants.

REPORTED BY: MARCIA M. MUONIO,
CSMR-4084
P. O. Box 52522
Livonia, Michigan 448152

ALSO PRESENT: CHARLES E. GAVETTE
JAMES E. ROGERS. JR.

I N D E X

WITNESS:	PAGE:
SHARON HAYS	
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EXHIBITS:	MARKED:
Deposition Exhibit Number Óne	11
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Birmingham, Michigan
Wednesday, March 7, 1990
At about 12:45 p.m.

S H A R O N H A Y S,

having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, Has examined upon her oath and testified as follows:

MS. SHECTER: This is the deposition of Sharon Hays taken pursuant to notice and stipulation of Counsel for both purposes under the Federal Rules of Evidence and the Federal Court Rules.

CROSS-EXAMINATION

BY MS SHECTER:

Q You are Sharon Hays, H-a-y-s?

A Correct.

Q What is your address, please?

A 477 Michigan Avenue, Detroit, Michigan 48232.

Q What is your home address?

A 36990 Gordon Lane. That's G-o-r-d-o-n L-a-n-e, Mt. Clemens, Michigan 48043.

Q You are currently employed by whom?

A By the Internal Revenue Service.

Q In what capacity?

A A personnel staffing specialist.

Q What's your responsibility?

A My responsibility is to assist managers with their staffing needs, determine employees' eligibility for promotion action, and to work on special programs in the personnel area.

Q And what was the third, to work on?

A Special programs in the personnel

area.

Q What's a special program?

A We have a variety of special programs, such as retirements, workmen compensation cases, priority consideration. Those' are a few of them.

Q What is your level, GS what?

A GS-11.

Q Do you have ultimate decision, for example, in determining an employee's eligibility for promotion?

A Yes.

Q So you are the person who makes that decision; is that correct?

A Whether they qualify for the position?

Q Yes.

A Correct.

Q You don't decide who gets the promotion?

A Right.

Q What goes into deciding if someone's qualified for the promotion?

A We have qualification standards that we use as references. And we pull the personnel folders and go through their work experience, prior work experience,
and their current position.

Q Do you make judgments then about whether a person's background and experience fits within the criteria set forth in the qualifications that you've described?

A Yes.

Q Where are the qualifications for

promotions that you've described found?

A Internal Revenue Manual 0338.

Q Would you repeat that, please?

A Internal Revenue Manual 0338; it's the Qualification Standards and Guideline Handbook.

Q You are looking at something to answer the question, What are you looking at?

A This is just my notes.

Q May I see them, please?

A Sure. I believe you have a copy.

Q That's the cover letter that was accompanying?

A Uh-huh. That's just to show you what we have attached. We have -- oh, excuse me.

MR. ZEBOT: I would indicate that

that cover sheet mentioning that provision was with the documents, right?

MS. SHECTER: That's what I was looking at, sure.

BY MS. SHECTER:

Q Where else did you say it was contained? And then I want to get to these documents.

A We also have general guidelines for some positions.

Q What do you mean by that?

A This is a single -- we have single agency positions and -- I don't know what you call the other. Let me think. And then we have positions that's used for all of Internal Revenue Service.

Q What do you mean by a "single agency position"?

A Single agency is just a position that just pertains to our agency.

Q But then you said "and then for all IRS positions." Isn't the IRS the single agency?

A I'm trying to think of how to say them.

Q Take your time thinking about it.

MR. ZEBOT: Yes.

MS. SHECTER: I'm not here to trick you. I just want to learn things, and you were designated as a person who could educate me.

THE WITNESS: I can't recall what the other is called. We mainly use the Internal Revenue Manual 0338.

BY MS. SHECTER:

Q Well what's the difference between

a single agency position and what you described as an IRS?

A For like criminal investigator, Internal Revenue agent we have our own guidelines, the IRM 0338.

Q Okay.

A For a tax examiner, a clerk, that's used throughout the area, then we use a general standard.

Q But they're all IRS employees, aren't they?

A Right. I'm sorry, they are all in the IRS. I'm sorry. They are; they're all filed in IRM 0338.

Q So what were you referring to when you were talking about something other than a single agency?

A It was a general standard that

multiple positions are listed on that --

Q Multiple positions for what?

A Well, like tax examiner, clerk, secretary, we go by a general standard. And this is specific.

MR ZEBOT: Off the record just a moment.

MS. SHECTER: Yes, I think we're both getting hopelessly confused.

(Discussion held off record)

MS. SHECTER: While we were off the record, -- we're on the record now -- there was a discussion among Ms. Hays, Mr. Rogers, Mr. Zebot.

BY MS. SHECTER:

Q So that I understand that, when you talked about single agency positions, these were positions unique to the IRS. But there were other positions which had general application to positions throughout the government such as a clerical position, which was not specifically unique to IRS. Is that what you're talking about?

A Correct.

Q How long have you been a personnel staffing specialist?

A Since 1984, six years.

Q And has that been in the Detroit district office?

A Yes.

Q And prior to that, what did you do?

A Prior to that I was a personnel

clerk and a classification clerk and a timekeeper.

Q When were you a personnel clerk, during what period of time; obviously prior to '84?

A 1983 to 1984. I have a total of 18 years' service.

Q How many other personnel staffing specialists, GS-11, are there in the Detroit district?

A Three.

Q And who are the other two?

A Sherry Chagnon.

Q Can you spell her last name for the court reporter?

A C-h-a-g-n-o-n.

Stephanie Gracey, G-r --

Q How do you spell that, p-h or --

A S-t-e-p-h-a-n-i-e, Gracey, G-r-a-c-e-y. And Joyce Paul is our recruitment coordinator. She's also a Grade 11.

Q Joyce?

A Paul, P-a-u-l.

Q Do your responsibilities differ at all from Ms. Chagnon or from that of Ms. Gracey?

A No.

Q So you all three do the same thing?

A Yes, but -- except for those special programs.

Q You're the only one that does that

A No. We all have separate programs that we're responsible for.

Q And your special programs are retirement, work comp?

A No. My special program is workmen compensation cases for examination division, priority consideration program.

And Stephanie Gracey -- we each have our own particular division, and then we handle the work load for that division. Like whatever comes in for a workmen's comp case --

Q And Stephanie Gracey, you were about to tell me?

A She handles retirements and the management careers program.

Q And Sherry Chagnon?

A Sherry handles the privacy act program and the drug abuse program, and both of those handle their own workmen compensation claims, also.

Q Do you have now or have you ever had any responsibility for the retirements program?

A No.

Q Do you have now or have you ever had responsibility for the management careers program?

A No.

Q Do you now or have you ever done any work on special programs connected with the retirements program?

A No

Q And what about the management careers program?

A I'm the flack-up to Stephanie Gracey.

Q So when she's overloaded or out, you do it?

A When she's on vacation, uh-huh.

Q Now, pursuant to a request for documents, you brought some materials with you today that I see stacked in front of you.

Do you want to go through and identify what they are? I know we have a cover sheet, but we'd like that on the record, and I'd like to be able to ask you some questions if I don't understand what something is.

A Okay. I brought the Internal Revenue Manual 0338. Qualification Standard and Guideline Handbook.

Q Why don't we pull that out and have that marked so that I know which

document that is? And then you can explain to me what it is and what its significance is.

A Okay. It should be the first item in your package. That's the letter from Frank. It should be the next -- right here, this is it.

Q It would be just this?

A Right.

MS. SHECTER: Let's have that marked then as Deposition Exhibit One.

(Whereupon Deposition Exhibit Number One was marked by the court reporter)

THE WITNESS: The next item is Article 13.

MS. SHECTER: Wait a second.

THE WITNESS: Okay.

MS. SHECTER: I should have asked you before we began, but for some reason I assumed that you already had deposition experience. Perhaps you haven't.

Have you ever had your deposition taken before?

THE WITNESS: No.

MS. SHECTER: This is your first?

THE WITNESS: This is my first.

MS. SHECTER: All right. It won't be that bad. You've had a chance to talk with your attorneys though, haven't you?

THE WITNESS: Correct.

MS SHECTER: And so they've told you what a deposition is like; is that correct?

THE WITNESS: Yes.

MS. SHECTER: So that you know if you answer a question, we're going to assume you intended that answer unless you tell us otherwise, correct?

THE WITNESS: Correct.

MS. SHECTER: And you're doing a wonderful job giving your answer verbally, which is the hardest part of deposition, I promise, because she gets angry when you go "uh-huh" because she can't take that "uh-huh." Do that and no problem.

BY MS. SHECTER:

Q Okay. That's Deposition Exhibit One.

What's our next document?

A The next document is Article 13, Promotion and Other Competitive Actions,

NORD III. That's taken from our contract.

Q All right. Before I mark that, let me ask you, my copy says NORD III on top.

A Uh-huh.

Q What does that mean?

A That's the national agreement between the union and the IRS employees.

Q And down below I have something written that says, "temp. prom. bargaining to non-bargaining can't exceed 120 days. Do you have that on your copy? You're looking as if you don't have it on your copy. I'll show you my copy.

MR. ZEBOT: Wait. She's not looking at the right one.

THE WITNESS: Oh, okay. That's just my note.

BY MS. SHECTER:

Q Okay. What does that mean?

A That's just if somebody applies for a position, for a temporary promotion, it can't exceed 120 days without competition. That's just a personal note. It doesn't have anything to do with this case.

MS. SHECTER: Let's mark that then as

Deposition Exhibit Two, and we'll come back and I'll ask you some questions.

THE WITNESS: Okay.

(Whereupon Deposition Exhibit Number Two was marked by the court reporter)

(Discussion held off record)

BY MS. SHECTER:

Q Okay. What's our next document?

A The next document is IRM 0335.2, service-wide promotion plan.

Q Now, what is the IRM? You've referred to that before.

A The Internal Revenue Manual.

Q And what is it?

A And that's our regulations.

Q So that everything you do pertaining to personnel is controlled by the IRM?

A Correct.

Q Does the IRM in all instances track the FPM, the Federal Personnel Manual?

A We base the Internal Revenue Manual from the Federal Personnel Manual to fit

our own needs.

Q Is it fair to say that in all instances, the IRM would agree with the FPM, the Federal Personnel Manual?

A Yes.

Q Than why do you need the IRM?

A Not all instances. I don't

Q In some instances?

A I'm not sure. I would have to compare the IRM with the FPM.

Q So you don't know. There may be some instances where they conflict?

A Right.

Q Where they conflict, what controls?

MR. ZEBOT: If you know.

THE WITNESS: I don't know.

MR. ZEBOT: Off the record for a minute.

MS. SHECTER: Sure.

(Discussion held off record)

MS. SHECTER: Back on the record.

MR. ROGERS: Just for the sake of clarification --

MS. SHECTER: Thank you, Mr. Rogers. We appreciate that.

MR. ROGERS: Thank you. There's basically three different areas that are controlling the areas of promotion and whatever; those being the Federal Personnel Manual that you mentioned the Internal Revenue Manual, which is the IRS regulations, and the third item being the NORD agreement between the National Treasury Employees Union and the Internal Revenue Service.

Normally and under most

circumstances, unless there's court cases, otherwise the NORD agreement would be controlling in regards to the IRM, and the IRM has been deemed to be controlling in regards to the FPM.

MS. SHECTER: So that your collective bargaining agreement would control over anything that involved the collective bargaining unit?

MR. ROGERS: That's correct.

MS. SHECTER: And that's the NORD, correct?

MR. ROGERS: That's correct.

MS. SHECTER: Now, I take it that the IRM) is just more specific than the FPM; is that accurate?

MR. ROGERS: Yes, it's more specifically I related to IRS business

and work.

MS. SHECTER: What's the basis for saying that if there's a conflict between the IRM and the FPM, that the IRM controls? What's the basis for that?

MR. ROGERS: Can we go off the record? I have a feeling that I'm testifying.

MR. TALBOT: Yes, it's getting close to that. I thought we were going to have a simple deposition.

(Discussion held off record)

MS SHECTER: Let's go back on the record.

BY MS. SHECTER:

Q Just so that we can establish -- I'm not sure what the last testimony Ms.

Hays gave, but based on the discussion that we've had with Mr. Rogers and Mr. Zebot, some of which was off the record, it's clear that the issue of conflict if any between the FPM and the IRM is a matter of legal determination.

And you'd agree with me that you are not competent to indicate what would happen in a particular instance; is that correct?

A I'm not sure, right.

MS. SHECTER: And so this IRM 0335.2 becomes Deposition Exhibit Three then.

(Whereupon Deposition Exhibit Number Three was marked by the court reporter)

BY MS. SHECTER:

Q Our next document, please?

A I've attached a copy of position descriptions for the Grade 13 Internal Revenue agents that were filled during 1986 through July of 1988.

Q And if I understand it, just looking at my document -- because it's attached with a rubber band, I want to just make sure that my packet agrees with yours.

There's a packet stapled that has -- the first document has, number one, agency position number 04082N in the upper right-hand corner?

A Correct.

Q And then there's another stapled-together document, which has IRS and it looks to me -- is it SFD?

A SPD.

Q SPD number 91269E?

A Correct.

Q And then the next stapled-together packet is IRS, SPD number 90725E, correct?

A Correct.

Q And then the next packet is IRS, SPD number 90296E; is that correct?

A Correct.

And the last is -- I'm sorry. The next is 90469E?

A Correct.

Q And 90922E?

A Correct.

Q And then the last is position description 04505E in the upper right-hand corner?

A Correct.

MS. SHECTER: And that becomes our Deposition Exhibit Four. Does everybody agree on that?

(Whereupon Deposition Exhibit Number Four was marked by the court reporter)

BY MS. SHECTER:

Q Our next documents?

A It's promotion packages for Grade 13 Internal Revenue agents. These packages include the roster of eligibles for promotion and promotion certificate, minutes of the ranking official, evaluative material and the person selected, and the announcement If it was available.

Q Okay. Because this was attached

with a rubber band, I just want to make sure that my packet agrees with yours.

The first, roster of eligibles for promotion and promotion certificate, that's dated 5-8-86, and my certificate number appears to be written over. Is this '86 or '85?

A Eighty-six.

Q And dash, what is that?

A Fifty-eight.

Q Okay. The next is 9-9-86, 86-139?

A Correct.

Q The next is 1-20-87, certificate number 87-11?

A Correct.

Q The next is date 1-20-87, 87-12?

A Correct.

Q And 1-20-87, 87-13?

A Correct.

Q 2-12-87, 87-49?

A Correct.

Q 2-24-87, 87-64?

A Correct.

Q 4-7-87, 87-94?

A Correct.

Q 4-16-87, 87-99?

A Correct.

Q 10-30-87, 87-194?

A Correct.

Q Then I have something that says Detroit district vacancy announcements. Is that the next document you have?

A Yeah, but that's, I think -- let's see.

Q Is there something that should be before?

A Yes, that should be attached to the 87-194. The stapler must have just --

Q Okay. That is that packet.

And then next is the 3-4-88, 88-20?

A Correct.

Q 8-31-88, 08-187-01?

A Yes.

Q Is that it in that packet?

MR. ZEBOT: I'm sorry. What was the last one?

MS. SHECTER: 88-187-01, 8-31-88.

MR. ZEBOT: Let me see this.

THE WITNESS: You've got 20-88?

MR. ZEBOT: Yes. That's all I had in there.

THE WITNESS: Maybe it's just continued -- no.

MS. SHECTER: That's why I go through packages with rubber bands.

MR. ZEBOT: That's a good idea. Maybe I better make a note of that number.

What is that number?

MS. SHECTER: That number is 8-31-88,

certificate number 88-187-01.

And this is becoming Deposition Exhibit Five then.

THE WITNESS: This is all together.

MS. SHECTER: There's more?

THE WITNESS: Yeah.

MS. SHECTER: That's the first rubber band. Let's make that first rubber band Five, and then we can go to Deposition Exhibit Six, because

otherwise were going to get awfully confused if we're not going to have separate deposition exhibits.

(Whereupon Deposition Exhibit Number Five was marked by the court reporter)

MR. ZEBOT: you have any clips or additional rubber bands by any chance?

MS. SHECTER: (Shaking head).

MR. ZEBOT: No, okay. That's all right. I don't want to slow things down.

BY MS. SHECTER

Q Understanding that the next packet is a continuation of the category, was it Five or Six that you're reading from?

A Six, promotion packages. This is the only last one for the regular

revenue agents. See, these were rubber banded because this was such a huge package.

Q I understand. This, what were working on now, is going to be marked as Deposition Exhibit Six, and let's make sure that my packet agrees with yours.

Date 1-28-88, certificate 88-75?

A Correct.

Q Then you tricked me, and this looks different.

A No, that all belongs to package 88-75.

Q So that will be -- let's make sure that at least the stapled packets are together.

I have a date of 1-25-88, O'Malia, Thomas?

A Correct.

Q The name is F-i-c --

A Ficsor, uh-huh.

Q S-a-r-a-l-t-a?

A Uh-huh.

Q Brennan, Terrence; Wynan Yee (phonetic), Sheryl; Sloane, Michael. And then part B, critical elements of position to be filled?

A All right. That should go with --

MR. ZEBOT: Off the record.

(Discussion held off record)

BY MS. SHECTER:

A Okay. George Zak then becomes the front, and the part B is attached to George Zak's packet?

A Right.

Q William -- what is that?

A G-n-i-e-w-e-k.

Q Albrecht (phonetic), Rosalie; H-e-i-l-a-la, Robert; W-e-r-n-e-r-t, Stephen; B-u-l-i-r, Wesley; Paschke, Thomas; W-a-y-c-a-l-e-w-y-c-z, Ronald; W-I-I-e-m-s-e-n, Michael; Clifford, Thomas; E-a-r-e-g-o-o-d, T-h-e-a-r-o-n; R-o-i-v-e, Stephen; Fitzner (phonetic), Ralph; G-r-o-h, Joseph; Van Eerden, William; and then A-b-e-s-a-m-i-s, Jesse. Is that that packet?

A Right, yes.

Q Anywhere in Deposition Exhibit Five, which is the first packet, and Deposition Exhibit Six, which is about to be marked, does it indicate whether any of these candidates were on worker's compensation?

A No.

(Whereupon Deposition Exhibit Number Six was marked by the court reporter)

BY MS. SHECTER:

Q Where would I be able to find out if any of these candidates were on worker's compensation?

A We have a log kept at the office. I'm not sure if it goes that far back to 1986.

Q What kind of log is this that you're describing?

A It's a log where we log in when a person files for a workmen compensation case.

Q And how long is that log kept?

A I believe three years.

Q So that the only way to determine if somebody's on worker's disability compensation is through that log? I'm just talking about the candidates for these positions, that's all.

A Yes.

Q And it's not part of, for example, their personnel file or any of the materials that you'd be looking at?

A No.

Q When I say "materials looking at," materials that you're looking at to consider them for a promotion.

A No.

Q Our last packet, what is this?

A Now, this is promotion packages. weren't sure if you wanted these or not. This is for managerial positions for

revenue agent, Grade 13.

Q And let's just make sure that the rubber band contains what you have.

A Okay.

Q Date 5-6-86, certificate number 86-56?

A Uh-huh, correct.

MR. ZEBOT: Let me see if I've got that.

THE WITNESS: Oh, that's that one you were missing.

MR. ZEBOT: Let me -- bear with me one moment.

MS. SHECTER: Sure. This is the time to do it.

MR. ZEBOT: Where was that in Five] was it in part of Five?

THE WITNESS: That was in the

first rubber band; that should have been the last portion, after 88-20.

MR. ZEBOT: Right after this one? Yes, 88-20, okay.

THE WITNESS: Right.

BY MS. SHECTER:

Q What happens after that log, by the way, that you've just talked about, the worker's comp log after three years, what do you do with it?

A I believe it's destroyed.

Q At that point then, what record if any do you of a person having been on worker's disability compensation?

A I don't know.

Q Is it fair to say that you don't know if there is any other record of someone being on worker's disability

compensation?

A Yes.

Q Indeed, during the existence of that log, there may, he other records as well; is that correct?

A Well, each specialist -- we keep a folder on each case, also. So if it's not in the log -- it should be logged in, but we've had, you know, different clerical. So if it wasn't logged in, we still have a separate folder for each workmen comp case that's kept for three years.

Q What's in that folder; is it current proceedings of the worker's disability compensation case?

A Any forms that the employee has filed for on-the-job injury, and we

forward those to the Department of Labor.

Q Do you retain at IRS, if you know, -- if you don't know, tell me -- retain at the IRS any records of individuals who were on worker's disability compensation and returned to work?

A Could you repeat the question?

Q Sure. Do you keep at IRS any records which would indicate whether a person has been on worker's disability compensation and returned to work?

A Yes, in those folders.

Q There would be records within the person's personnel jacket as well, wouldn't there?

A I don't know.

Q What I'm asking is, how can I find

out if the persons who were considered for positions or who may have got positions were persons who were on worker's disability compensation either at the time they got the position or prior to it? If you don' know, indicate that you don't know.

A Yeah, I don't know.

Q You have no idea?

A I don't know.

Q Back to our exhibit. 8-28-86 is my second page, and I it's certificate number 86-113?

A Yes.

Q 11-26-86, certificate number 86-168?

A Yes.

Q Date 12-12-86, certificate number

86-187?

A Yes.

Q Date 1-9-87, certificate 87-03; date 8-11-87, certificate number 87-146; date 8-12-87, certificate number 87-152; then I have something that looks like management careers panel rating form, and it's for Barbara D. Greene, G-r-e-e-n-e?

A Okay. That all goes with certificate number 87-152.

Q And the next one is Susan Swanson, S-w-a-n-s-o-n. Does that go with it as well?

A Yes.

Q And then we go to 12-4-87, certificate number 87-224. And with that certificate, do we then have Hugh

Snowden, S-n-o-w-d-e-n?

A Yes.

Q Two packets of Hugh Snowden, one single page and one stapled?

A Uh-huh.

Q Ron Pattyn, P-a-t-t-y-n?

A Yes.

Q Sandra Battle, B-a-t-t-l-e?

A Yes.

Q Then I have roster of eliglibles for promotion or promotion certificate, date 8-16-88, certificate number 88-150-01?

A Yes.

Q And then going with that would be Bill Piner, P-i-n-e-r; Dave Petrillo, P-e-t-r-i-l-l-o; Larry T. Strang, S-t-r-a-n-g?

A It's Strong.

Q Strong?

A Uh-huh.

Q Okay. Kay Kronewritter, K-r-o-n-e-w-r-i-t-t-e-r?

A Yes.

Q Reanee, R-e-a-n-e-e K-a-l-v, as in Victor, i-n-s-k-i and Donelda, D-o-n-e-l-d-a, Zahline, Z-a-h-l-i-n-e?

A Yes.

Q That's it?

A Uh-huh.

MR. ZEBOT: Let me see that again, I'm sorry, one second. I think I missed one at the very beginning. I may have missed one or two.

(Whereupon Deposition Exhibit Number Seven was marked by the court

reporter)

BY MS. SHECTER:

Q We have marked that last package then as Deposition Exhibit Seven, and that represents all the documents that you have brought responsive to the request for documents; is that correct?

A Correct.

Q Let's go back to Deposition Exhibit One and see if I understand what you brought and if I have any questions about it.

Deposition Exhibit One refers to Internal Revenue agent, Series 512. What is this?

A This is the qualification handbook that we use to determine if an applicant is eligible for a revenue agent

position.

Q And that's the book that you said you looked at to be able to make a judgment of their qualifications?

A Correct.

Q Just glancing at it, it seems to refer to, for example, Handbook X-118 in one point. And is that a separate handbook, or is this the same handbook?

A No, that's -- okay.

Q I'm looking, for example, at basic requirements for all grades on page one. Go to line four underneath that. It says Handbook X-118, Accounting Series GS-5/10.

A Okay. We also use that handbook.

Q And did you produce that handbook?

A No.

Q Instead of asking you why not, tell me what that handbook is and what it means and all that other nice stuff so that I understand. Do you know about that other handbook?

A It's -- I know it and I refer to it, but I don't know how to explain it.

Q Do you, know why this was produced and not the other handbook?

A Because I was told this was just for Grade 13.

Q Okay. So the other handbook refers to what?

A It refers to Grade 5 and Grade 7.

Q And does this manual, this Deposition Exhibit One, refer to Grade 12 and above?

A Yes.

Q How high up does it go?

A It goes up to Grade 15.

Q And are all positions Grade 15 and above filled competitively?

A Unless it's a reassignment. If there's no chance for advancement, that's called a reassignment. But if it goes to a higher grade work, they have to compete.

Q When you say "no chance for advancement," what do you mean by that?

A If, say, a Grade 11 revenue agent applies for another Grade 11 position, they don't have to compete. We would just reassign them.

Q Now, what do you mean by "competition"? When you say "they compete," what does that mean?

A Competition is when an employee competes under our merit promotion -- in a merit promotion package for a higher level grade.

Q And what does that mean; what do you mean by "merit promotion package"? If you don't know, just indicate that.

A I know, but -- let me think. Do you want to know what the merit promotion program is?

Q Well, I asked you what you mean by "competition," and your answer was they compete in a merit promotion package. So I asked you what do you mean by that?

A Okay. Well, it's under the service-wide promotion plan, which all Internal Revenue Service employees have to compete.

Q When you say "service-wide," what do you mean by that?

A Internal Revenue Service.

Q So that means that someone working in the Detroit district is not restricted to a position in the Detroit district; they could go elsewhere?

A Correct.

Q And is there anything different about the methods or procedures of competition, for example, between Grade 12 and Grades 13, 14 and 15? The same procedures follows for all?

A Yes. Oh, except if it's a manager's position.

Q What is the management level?

A Grade 13 -- well, it varies from division to division. But then that's

handled by Stephanie under the management careers program.

Q This promotion program that you talked about does that involve promotion rosters in any way?

A Rosters for six months, you mean? It could, yes.

Q What is a promotion roster?

A A promotion roster is when a division anticipates filling a number of positions within a six-month period, we announce it as a roster rather than an ad hoc certificate.

Q What Is an ad hoc certificate?

A An ad hoc certificate is an announcement for one position -- I mean, not one position but -- yeah, one position, but they could have more than

one vacancy.

Q Explain that.

A For a revenue agent in Mt. Clemens, Grade 13, they anticipate three vacancies right now. So we would announce it and fill three vacancies but it's for, you know, one -- all in one vacancy announcement.

As opposed to a roster, we would announce it, and they would have six months to fill, you know. Say they have vacancies right now, and maybe in two months they're going to have 13 more vacancies, they can select off that same roster.

Q But that's good for only six months?

A Yes.

Q To whom do you send these promotion announcements?

A After they're announced? We post them on the bulletin board and all of our post of duties.

Q And to all of?

A Post of duties.

Q What's that?

A The Detroit district has different post of duties but with the personnel office in Detroit.

Q When you say "poster duty," what do you mean by that?

A It's the commuting area of the position. It's -- we have post of duties in Mt. Clemens, Kalamazoo --

Q Physically in some places?

A Yes.

Q What arrangement if any do you make within the announcements of promotion availabilities to persons who are out on a disability compensation?

A None, to my knowledge.

Q Did you have any involvement with Mr. Gavette in terms of Mr. Gavette's case or Mr. Gavette's situation in any way?

A I have his current workmen compensation claim.

Q But that's it?

A That's it.

Q And I take it during the period of time that he's been out on his current worker's compensation claim, you did not send him the announcements of any promotional availabilities?

A No.

Q For people who are out on worker's disability compensation do you or anyone else send those individuals statements of their rights concerning when they should apply for re-employment relating to their worker disability compensation?

A I don't know. I don't.

Q This section of Deposition Exhibit One ends at 512.26. Is that the complete section?

A Yes.

Q And this is -- I'm guessing as to why you gave me just Section 512. Is that because this is all for Grade Level 15?

A Grade 9 and above.

Q Grade 9 and above. Let's look at

Deposition Exhibit Two, and this refers to the collective bargaining?

A Correct.

Q How, if at all, does this differ from Deposition Exhibit One?

A This is the qualifications that we used to determine

Q "This" meaning Deposition Exhibit One?

A Is this what you're referring to, 512?

Q Yes, deposition Exhibit One?

A This is our guidelines to determine if an employee is eligible for the position.

Q Once you have the guidelines, then if it's a collective bargaining position, then you apply Depositior

Exhibit Two?

A Correct.

Q And so this would tell me the procedure that you used; is that correct?

A Correct.

Q There's something written in on what appears to be page 27, Section 8, miscellaneous. Is that your handwriting?

A Yes.

Q "If division knows the date of training for sure, put in date. Otherwise on certificate write in for effective date, asterisk"?

A Yes.

Q What is that all about?

A That was just a personal note. That

means that if a package is ranked, but the training -- say the package is ranked in March, but the training class doesn't start until July. For the effective date, we'd put in the July date rather than the following pay period.

Q The asterisk refers to something, and mine is obliterated.

A And so is mine.

MS. SHECTER: Does anyone have it?

MR. ZEBOT: You don't know what it is offhand?

MS. SHECTER: Do you know what it is offhand?

THE WITNESS: No.

MR. ZEBOT: We'll try to get that page.

THE WITNESS: Oh, wait. I have my book.

MR. ZEBOT: Do you have your book?

THE WITNESS: Yes. I should have deleted all that, I guess.

MS. SHECTER: I'm not going to hold it against you though.

THE WITNESS: Okay. Oh, I just put, "Promotion will be effective at the beginning of training." That's what I write in on the certificate for the effective date. If the division doesn't know for sure when the training class is going to begin I write that statement in there.

BY MS. SHECTER:

Q During your experience in the period of your responsibilities, has a

person who's been out on worker's disability compensation ever been promoted, to your knowledge?

A I'm not prepared to answer that.

Q You don't know one way or another?

A No.

Q But as to the people who you yourself have approved for promotion, do you know if any of those people have been on worker's disability compensation?

A I don't know offhand. I didn't research that.

Q Would you know how persons who are on worker's disability compensation become advised of promotional opportunities?

A No, I don't.

Q Okay. Let's look at Deposition Exhibit Three. This is a service-wide promotion plan. Now, this is again from the IRM, the Internal Revenue Manual

A Yes.

Q And what is this?

A This is our regulations that explain the service-wide promotion plan.

Q Now, how does this differ from Deposition Exhibit Two?

A This is the Internal Revenue Manual.

Q And the other is the collective bargaining?

A Is the contract.

Q But you told me that Deposition Exhibit Two would tell me, if I read it, the procedures that you follow. So what

does Deposition Exhibit Three do that Deposition Exhibit Two doesn't?

A This covers all positions, bargaining or non-bargaining.

Q Would Deposition Exhibit Three duplicate in any way for collective bargaining positions that which is laid out in Deposition Exhibit Two?

A It could.

Q When you say "it could"

A Well, for a bargaining -- there might be things in the contract for bargaining positions that differ from the Internal Revenue Manual.

Q But as to things which are for bargaining positions, it should be identical then to Deposition Exhibit Two; is that correct? If you don't know,

tell me.

A I don't know.

Q Once you determine that someone is qualified, what do you do?

A Once a person -- we determine if a person's qualified, we request a performance evaluation from their manager.

Q Would that be the most recent performance evaluation or a special performance evaluation for purposes of promotions?

A Their most recent, but it can't be over one year old from the date of preparation. And if it's over six months, it has to be revalidated by the manager and the employee.

Q So that there could very well be a

special performance evaluation made specifically for consideration for promotional purposes if the old one is more than six months old?

A Yes. Or if their duties have changed, another one could be prepared, too.

Q And the materials that you look at to determine the initial qualifications, are those materials which the applicant sends you in response to the posting

A Once we announce a position, the employees send us an interest card, a Form 4536, application for promotion reassignment. Then we pull their personnel folder and look at their other previous positions to determine if they're eligible.

And they also have to meet time and grade. So if they apply for a Grade 13 position, they must have served one year at the Grade 12 level.

Q And do you look at anything else in determining whether they're qualified?

A We look at all the information in their personnel folder. We look at college transcripts, their SF-171, application for employment, and all their government experience.

Q Once you determine that someone is qualified, then you get the latest appraisal?

A Yes.

Q And then what happens?

A Once the appraisals are in, then we set up ranking.

Q How do you do that?

A We receive a rank -- the name of a ranking official from the division, and we contact the manager and ask them when they can rank the package. And they come up and they review all the material.

Q Now, when you say "ranking," you yourself don't do the ranking?

A No.

Q That's, done by a ranking official from the division?

A Correct. It has to be a management official at the same grade level or above.

Q And what is the basis of the rankings; that is, whom are they, qualified, highly qualified, best

qualified or something like that, or do they get numbers?

A What they do is they compare the critical elements that the applicant is on now to the critical elements of the job they are applying for. And for each critical element, they have to write a narrative supporting their rating. Then they determine a highly qualified cutoff score, and the people who rank at the top are best qualified. And those are -- the applicants are referred to the selecting official.

Q How many applicants are considered to be best qualified; is there a number?

A There's four for the first vacancy and an additional name for every vacancy after that.

Q What if all four for one reason or another are rejected who are best qualified; do you then go down the roster?

A No. Then they just non-elect. If there's a tie score, we go down to the score breaks.

Q It's the point at which somebody else has the point rate which there is a next lower score even if the number is higher than four?

A Right.

Q You could have seven if there's a tie of four people?

A At four, right.

Q When you say you "non-select," does that mean the position goes vacant?

A Yes. That's up to the selecting

official whether not they want to select one of those best qualified.

Q And if the selecting official decides not to select someone best qualified, do they go back to the roster, or is that again within the discretion of the selecting official, if you know?

A Well, a roster is different from an ad hoc vacancy. So if the manager non-selects on an ad hoc vacancy, they can re-announce it at a later date.

MR. ZEBOT: Let me just interject for one second.

MS. SHECTER: Isn't the term roster also used -- perhaps that's where you're picking it up, Lynn -- for a list of candidates --

MS. SHECTER: That's where I'm picking it up.

MR. ZEBOT -- for a particular vacancy as opposed to having a roster of people for any vacancies that occur over six months?

THE WITNESS: Are you talking -- she's not talking about a six-month roster?

MR. ZEBOT: No, no. She's talking about the roster sheets, right, which -- isn't a sheet called that, where you list

THE WITNESS: Right, so it would be all the names.

BY MS. SHECTER:

Q Define for me what you were just talking about. Are there two different

kinds of roster?

A Well, there's a six-month roster.

Q Which is what?

A Which is if they anticipate numerous vacancies within a six-month period, they can use the same certificate.

Q "Certificate" meaning what?

A This roster of eligibles, this is the certificate.

Q And that's what you've done, is decide who's eligible for the promotions; is that correct? No?

MR. ZEBOT: Wait, wait. I think you're still confused. Let's go off the record for a moment.

(Discussion held off the record

MS. SHECTER: Let's go back on the

record so maybe we can straighten this out.

BY MS. SHECTER:

Q As I understand it, there are different kinds of rosters; is that correct?

A There's a roster of eligibles for promotion.

Q Which means what?

A It's Just a list of eligible applicants.

Q And how is it determined that an applicant is eligible?

A By the staffing specialist.

Q Which is what you do?

A Right.

Q So when I asked you before, that's what you do when you look at the IRM

qualifications that we talked about earlier in Deposition Exhibit One. That's what you're doing when you're determining if they're eligible. And you Just gave me the different things that you looked at --

A Correct.

Q -- to determine their eligibility?

A Correct.

Q And that's one form of the roster. And then that roster is maintained for six months?

A Oh, no.

Q No?

MR. ZEBOT: You're confused. Let's go off the record again.

(Discussion held off record)

MS. SHECTER: Go back on the

record.

THE WITNESS: I'm quoting from page 24 of the NORD III agreement. Can I do that? Oh, I can't do that? Okay, I'm sorry.

MS. SHECTER: What's wrong with it?

MR. ROGERS: Can we go off the record a second?

(Discussion held off record)

THE WITNESS: Okay, this is a one-time roster.

BY MS. SHECTER:

Q "This" meaning -- what are you pointing to?

A This Form 4537, roster of eligibles for promotion.

Q For a particular position?

A Yes. It can be a one-time or a

six-month roster.

Q I understand that. Now, the next question I asked you was, when you were determining who was eligible to be put on that roster, are you the person who does that?

A Yes.

Q And so the steps that you testified about taking were to put people on those two particular rosters?

A Correct.

Q Now, how is it determined for a position which is -- strike that.

How, how is it determined for a six-month eligible roster who gets a particular position when it comes up?

A The same way as it is for a one-time.

Q Still in sequence, based on the scores?

A Based on the scores.

Q So then in the case of a six-month roster, the score may not be pursuant to or particularly applicable to a specific position then; is that correct?

A No. It would still be to a particular position.

Q If everyone on a six-month roster is scored and you're not looking for a particular position, then how are you scoring them?

A We announce it as a six-month roster for a particular position.

Q Oh, I see. So that it's a particular position, but there may not be such a specific position available

A Correct.

Q How are people who are out on worker's disability compensation notified of their EEO rights?

A I'm not prepared to answer that.

Q Do you know if they are?

A I don't know.

Q You certainty don't do that?

A No.

Q When is somebody detailed? I see a reference to that as an exception to the competitive procedures.

A If there's a vacancy and it takes us awhile to announce the position, they can detail a person to that position until the position is filled.

Q So it's somebody who fills it on a temporary basis?

A Yes.

Q And are details limited then to 120 days?

A Yes. After that they have to compete.

Q The person who occupied a position on a detail, is that person given some credit for the time that person was on detail within the position?

A They could be in the ranking procedure. That's up to the ranking official.

Q And pursuant to 0335.222(2), I see that a personnel action must be made as an exception to the competitive procedures of the plan if it's an action as taken as remedy -- I'm reading (a) -- if it's an action taken as a remedy for

failure to receive proper consideration in competitive promotion action; is that correct?

MR. ZEBOT: Excuse me, Lynn. I didn't get the reference.

THE WITNESS: I don't know either.

MS. SHECTER: Sure. 0335.222(2)(a), and I'll repeat the question for you.

MR. ZEBOT: Two, two, two; three two's?

MS. SHECTER: Three two's and then and then (a).

BY MS. SHECTER:

Q My question was then, pursuant to that provision which I've just cited, that a personnel action must be made as an exception to the competitive procedures if it's an action taken as a

remedy for failure to receive proper consideration in a competitive promotion action; is that correct?

A Yes.

Q Have you yourself ever been involved in anything like that?

A I can't recall.

Q Do you know how that's handled if it's a personnel action which must be made as an exception to the competitive procedures of the plan for an action taken, as a remedy for failure to receive proper consideration in a competitive promotion action?

A If it's a regulatory or procedural violation of the service-wide promotion plan, they would be given priority consideration.

Q What do you mean by "priority consideration"?

A That mans if they were omitted from the competitive promotion package, they would be submitted on certificate prior announcing that position for consideration if the selecting official wants to select him, if a grievance was filed. A grievance has to be filed.

Q So that would be only for collective bargaining positions?

A Yes.

Q And what if it's a non-collective bargaining position?

A I don't know.

Q I'm looking now at 0335.231, consideration of internal candidates. I'm looking at (1) the minimum area of

consider. What is that?

A That's the area of consideration that we put on the announcement. We put district-wide. All of our announcements are district-wide employees.

Q Is there any limitation of persons outside the district applying?

A No. Any Internal Revenue Service employee can apply?

Q So minimum area means that you don't want to limit it to people who are Just working in that particular physical facility; is that what you're talking about?

A That's the smallest area that we would consider.

Q Do you know when you limit applications to the district, if at all?

A We don't.

Q Do you know if anybody does?

A The Detroit --

MR. ZEBOT: What do you mean by "anybody"?

MS. SHECTER: That's a fair question.

BY MS. SHECTER:

Q Any other districts submit the applications to their district?

A I don't know.

Q Unfortunately, my copy -- I'm referring you to 0335.251(2). I don't know if your copy suffers from the same deficiency as mind in the lower right-hand corner.

It's blocked out.

A Okay. It should say, "must insure

that priority consideration"

MS. SHECTER: With everybody's permission, I'll write it into the exhibit so that we have it.

MR. ZEBOT: Yes.

THE WITNESS: Line four --

BY MS. SHECTER:

Q Let me go on. "And carried out by personnel"? Do you see where it starts?

A "Personnel," correct.

Q Okay. "Personnel must insure that priority" --

A "Consideration", c-o-n-s-i-d-e-r-a hyphen.

Q -- "is properly applied in accordance" --

A "With", just "with," and then "regulations in IRM procedures."

Q How do you remember that?

A I don't know.

Q I'm am looking again under 0335.252 and I don't see any requirement there that a grievance be filed. Can you help me, show me where that is? It's not in that particular --

A I don't see it.

Q Okay. There are some other pages which appear to have crinkled up and hidden some of the bottom, but I think I can make out most of them.

A The only thing I can find saying they have to grieve it is in the contract. It states "grieve it proper consideration."

Q It states what? I'm sorry.

A It states that the applicant must

be a grievant.

Q May I see what you're reading from? This is NORD III national agreement between the Internal Revenue Service and the National Treasury Employees Union, document 6647, revised 7/89.

Q Do you know if the provision you were reading from was in effect prior to July of 1909?

A I don't know if it would have stated grievant in the prior contracts.

Q In Section 10, priorities consideration, is what you wore reading from?

A Yes.

Q And so that we don't have to make this an exhibit, I'll just read it into the record.

A Section A, first paragraph.

Q "If it is determined, through the grievance procedure, that violations of the provisions of this article resulted in denying the grievant(s) proper consideration, corrective action will be taken as follows: (1) Employees erroneously omitted from a best qualified list will receive priority consideration in accordance with the FPM; (2) Employees on the best qualified list who do not receive a fair and objective rating from the ranking panel, ranking official or immediate supervisor shall be entitled to priority consideration, if their rank order on the best qualified list is improved (3) Employees who were erroneously omitted

from, or improperly ranked on a roster announcement, but who do not otherwise qualify for relief under Subsection A(1) or (2) above, will be ranked in proper order on such a roster; and (4) Other violations will be remedied as appropriate."

That's what you were reading from?

A Yes.

Q Does this NORD III national agreement contain anywhere a provision that says if the individual does not grieve, that individual will not be considered for priority consideration?

A I don't know.

Q Okay. Let's look now since I think I can figure out the rest of the pages where -- does this have very thin pages?

Is that why it kind of crinkles up on the bottom?

A We've been having trouble with our Xerox machine.

Q I think I can figure out the rest of the bottoms, so let's look at Deposition Exhibit Number Four. Now, will you explain to me what this is?

A This a person's position description, which outlines their duties and responsibilities for that position.

Q And for what period of time does that position, Exhibit Four, cover?

A It covers --

Q It says 1982 on this first one, but I --

A Well, it covers all the vacancies filled during 1986 through July of 1988.

These are the position descriptions for these packages of vacancies. The date you were referring to was the date it was written.

Q I see. How do I tell when the position then was posted?

A The date was posted -- oh, by the announcement. It wouldn't be on this. It would not be on the position descriptions at all. It's on -- some of these we didn't have the announcements for. Let me pull one of those.

Q How long do you keep these position announcements?

A We keep them with the package. But Just for the ones that we didn't have the announcement inside the package for some reason, I put a note on here, "No

announcement available for this package." See, they're pulled a lot of times and Xeroxed a lot of times.

Q How long do you keep the packages?

A Three years.

Q And what happens at the end of three years?

A At the end of three years we send them downstairs and they're stored for additional years. I don't know how long, and then they're destroyed. So we have no records for 1985.

Q Because they're downstairs stored goodness knows where?

A No, because they're destroyed.

Q But you said you didn't know how long they were kept downstairs?

A Okay, hold on. Okay; I'm sorry.

They're destroyed after two years, after the personnel action --

Q You're reading from what, please? That's from the --

A Guideline I received from my Facilities management branch.

Q And that's the cover sheet that you provided to me, page two?

A Yes.

MR. ZEBOT: Yes, page two.

BY MS. SHECTER:

Q So if a position was filled in '86, then the package would be destroyed in '88?

A We've kept some, but I'm not sure why. I mean, we have some on file because I think our guidelines is to keep them for three years, something to

do with EEO, I believe. And then we send them downstairs, and I don't know how long they keep them down there. You were asking me when was the position announced?

Q Yes. How can I tell when the position was announced?

A It's on the vacancy announcement, the issue date.

Q And how do I tell when the position is filled?

A When the position is filled, the selecting official indicates on Form 4537 the name of the person they have selected and selection date.

Q Now, what's in this package that you're referring to? What is supposed to be in there?

A For the position descriptions? We have different type of revenue agents, and we have some in specialty groups. One is an Internal Revenue agent special enforcement. Another one is a CEPT member. So they all have different duties than a regular field agent.

Q And so your package contains?

A Our merit promotion package would contain the roster of eligibles, a Form 4536, which is the interest card, a job element appraisal, the most current job element appraisal, a letter to the employee advising them that we are using this job element appraisal, minutes of the ranking official, and a copy of the critical elements that were used in the ranking.

Q Deposition Exhibit Four then contains all that material for vacancies filled from '86 to '88?

A Right. That's the promotion packages for a Grade 13?

Q Correct.

MR. ZEBOT: Through July '88; isn't that correct?

THE WITNESS: Yes.

BY MS. SHECTER:

Q Okay. I understand what you're saying.

Deposition Exhibit Five now, this is the roster of eligibles for promotion and promotion certificates. And these are the people who were considered eligible for specific positions?

A Who have applied and were

considered eligible, correct,

Q Some have asterisks, some haven't on this first page why is that?

A If they have an asterisk before their name, that means they're highly qualified.

Q And who placed that asterisk there?

A Personnel.

Q Did you?

A Yes, based on their ranking.

Q That somebody provided to you?

A Yes.

Q Now, how do -- strike that.

Looking at part two, promotion certificate, which is the second page of the certificate number, whatever that is, 86-58, you said?

A Yes.

Q You have four names listed as highly qualified?

A Those would be best qualified.

Q These are the people who are best qualified?

A Uh-huh. Those are the ones who ranked at the top after the ranking procedure.

Q I see. So everyone with an asterisk is highly qualified and best qualified is the ranking above highly qualified?

A Yes.

Q So these are your highest people as determined by the ranking official?

A Yes.

Q Now, where in this package do I learn who received the position?

A Down on the bottom of Form 4537, it states, "I have selected the following named person, James Beumel."

Q And that will tell me the selection date and the effective date of the position; is that correct?

A Correct.

Q Now, under organizational designation, I see, for example, on the first there's a reference to Indianapolis or what I suppose is Indianapolis because the "s" is off, and then Salisbury, Maryland. Are these people from outside the district who applied?

A Yes.

Q Do people appear on one or more rosters of eligibles?

A They could if they had a continuous consideration and in or they filed an interest card for that particular vacancy.

Q Because I see, for example, 86-58 and 87-11, that those two names are identical.

A Oh, that's possible.

Q And 87-12.

A Uh-huh. In fact, for the Grade 13 vacancies, most of the Grade 12's would apply if they want that post of duty.

Q And why is that?

A Because it's a promotion.

Q Although the form may look different, I think in some of the more recent ones it looks like it was generated by computer, it's still the

same form, the same procedure was followed?

A Yes.

Q Okay Let's look at Deposition Exhibit Six. Now, as I recall, Deposition Exhibit Six is really a continuation of Exhibit Five; it was just that the rubber band was not large enough to accomplish encompassing all of them?

A Correct.

Q Now, these packets in Deposition Exhibit Five and Six do not contain, for example, all that was in the personnel jacket and in the personnel folder that you looked at; is that correct?

A Correct.

Q Why were these particular items

selected which are included in Deposition Exhibits Five and Six?

A The Form 4536, the interest card, and their evaluation is mandatory for a person to compete in a merit promotion package, and also we have to consider the awards for their last three years.

Q But why don't you put anything else in the package? For example, what -- strike that.

Why don't you put anything else in the package?

A From their personnel folder?

Q Yes.

A We would have no room to store them. They are promotion packages.

Q So, for example, if an employees

says, "I want to put something in so that the ranking official or whoever's going to make a decision will look at it," does the employee have the right to have that considered?

A Yes, they can indicate it on their interest card, which that's what they're supposed to do. Or some employees have attached a sheet of paper to their interest card.

Q So unless the employee Indicates otherwise, this package represents what you normally and ordinarily put into a package for consideration for promotion; is that correct?

A Correct. But the ranking official can also review the official personnel folders.

Q Are there any such packages or procedures followed when somebody asks for a reinstatement or re-employment from worker's compensation?

A I'm not prepared to answer that.

Q Because you don't do it and you don't know that?

A I work with workmen compensation claims, but I haven't reviewed what you just asked.

Q We]], how does someone go about saying "Hi I'm recovered, I want to go back to work" How does that happen?

A I'm not prepared to answer that.

Q And why is that?

A I haven' reviewed the regulations.

Q Do you normally take care of that procedure? Is that part of your normal

and customary duty?

A I'm trying to think if I've ever had a case where that's happened.

Q Take Your time.

A Could you repeat the question?

(Whereupon the last Question was played back by the court reporter)

MS. SHECTER: Okay, you can answer

THE WITNESS: Oh, okay. There's no merit promotion packages because that person isn't applying for a promotion.

BY MS. SHECTER:

Q No. My question is, how does a person go about, or how do you go -- strike that.

Do you have anything to do with the reinstatement or re-employment procedures when a person is returning

from worker's disability compensation?

A I'd have to say no.

Q Do you know who does?

A If they're returning to duty, the division has to submit an SF-52 request for personnel action.

Q When you say "the division" has to do that, how does the is division go about doing that?

A Well, the employee would notify his manager that he's returning to work, and then the division submits the SF-52 notifying personnel that the employee is returning to work so that we could -- if he's on leave without pay and not getting paid, that would notify us to, you know, put him back on the time and leave records.

Q What if the person that was returning from worker's compensation -- it sounds, when you say the employee notifies the manager he's returning to work, that that's all that's required for the person to become reinstated; is that correct?

A I don't know.

Q So you don't know really how the reinstatement works?

A No.

Q Deposition Exhibit Seven, the first part is similar to that which we've been looking at for certificate 86-56. When you say, "Note MCP files for 1986 for Averebuch and Shirley Ray," MCP is what?

A Management careers program class.

Q Do you know why that's true?

A No, I don't.

Q Or, again, on page two of the deposition exhibit, M-a-t-u-r-e-n?

A No. I don't know why.

Q Or Larry Griffiths?

A No.

Q And, again, for the management career panel procedure that's followed, is it the same procedure that you've described for persons who were not at management level?

A It's handled a little bit differently.

Q How is that?

A Can I have a minute to review my notes?

Q Absolutely.

A This isn't really my program.

They still determine highly qualified and best qualified.

Q Who is "they"?

A The management careers board, which is a body of high-level officials, and they're responsible for monitoring the management careers program. And I'm not sure how the rest of it's handled.

Q You were reading from what?

A The are just notes on the management careers program.

Q May I see that?

A Uh- huh. See, it has differed over the years, so it's hard to explain it.

MS. SHECTER: Can we just mark these notes then as Deposition Exhibit Eight? Do you have any objection?

MR. ZEBOT: Just off the record.

(Discussion held off record)

MS. SHECTER: Well, I'll make a copy of it.

MR. ZEBOT: Yes. Could you make a copy for me as well?

MS. SHECTER: Sure. Well mark this Deposition Exhibit Eight.

(Whereupon Deposition Exhibit Number Eight was marked by the court reporter)

BY MS. SHECTER:

Q One of the factors that look at, if someone is qualified, is their time within their position?

A Yes, time and grade.

Q Is there a minimum time and grade that a person has have before they --

A They have to have one year time and

grade if it's a one-grade-interval position. If it's a two-grade-interval position, they either have to have one year in the next lower grade or two years in the second lower grade. For instance, a revenue officer -- I'm trying to think of an example.

Q Sure, take your time.

A For a revenue agent, Grade 12, applying for a Grade 13, they have to have one year time and grade, if they're a revenue agent, Grade applying for a Grade 11, --

Q Two years in a Grade 9?

A -- one year because there is no intervening grade.

Q Because there's no Grade 10?

A Right.

Q But if you were applying for a Grade 13 from Grade 11, would you need two years of Grade 11?

A You would need one year at the Grade 12 if that position had that grade.

Q Is time -- strike that.

How is time spent on worker's disability compensation credited for purposes of time and grade?

A I don't know. If they're still -- can I retract that?

Q Absolutely.

A If they're still on our rolls, we would still consider them having the time and grade.

Q And what do you mean by "on your rolls"?

A Like an employee who's a seasonal employee, we have seasonal taxpayer service reps, they have to serve 2,080 hours because they don't work a whole year. You know they work part of the year and then they're off part of the year. Does that explain it?

Q No. My question is about worker's disability compensation. What do you mean when you say "if they're still

(Note: Obliterated by copy marks)

A I'm not sure. I'm not sure how to answer that.

Q Well let me try it this way. For how long is a person on worker's disability compensation kept on your rolls

A I'm not prepared to answer that.

Q Because this isn't your program?

A Because I don't know. No, I just don't know the answer.

Q Isn't this your program, the worker's disability?

A It's my program, but I haven't really had too many cases dealing with a person being on an extended leave without pay for a workmen comp case. Most of mine have dealt with traumatic injuries where the employee gets injured, they go to the doctor, they're off two weeks, and they come back to work.

So I would have to research the federal compensation guidelines in order to answer your question properly.

Q Where are those fed comp guidelines

kept then?

A They're in the Internal Revenue Manual, Chapter 810.

MS. SHECTER: Let's take a few minutes.

(Pause in proceedings at 2:30 p.m.)

(Proceedings resumed at 2:45 p.m.; all parties present)

BY MS. SHECTER:

Q you had no contact with Mr. Gavette during the time of his two previous worker's compensation?

A No.

Q So you don't know what notifications if any he received while he was out on worker's compensation; Is that correct?

A Correct

Q The union contract that we looked at, that was the most recent one, May of 1989?

A yes.

Q You don't know what changes if any occurred from previous years?

A Not without comparing the two.

Q And we don't have them with us today?

A No.

Q How often is that union contract renegotiated?

A I'm not sure. I believe it was two years. I believe the last one was '87, Is that -- it's yearly. Wait, it's every year.

Q Do you know?

A It's every year, isn't it?

MS. SHECTER: It varies?

MR. ROGERS: It varies from contract to contract.

MS. SHECTER: Depending on when you get an agreement?

MR. ROGERS: Sometimes they're extended, sometimes they're not.

BY MS. SHECTER:

Q The IRM manual that we looked at covered promotions to GS-15 . Would that include GS-15, or is that only up to GS-14?

A It covered GS-9 and above.

Q Nine and above?

A Uh-huh.

Q Is there a requirement that if one works, for example, at GS-12 and more than 25 percent of your work is at a

GS-13 level that you receive a promotion to the GS-13 level at least on a temporary basis, if you know?

A I don't know.

Q When you re looking at people's qualifications for promotion, does that come into play at all?

A Oh, yes. We consider it when they apply for a position. We count that time they spent as a Grade 13 if it's officially document" in their personnel folder.

Q What about the first question I asked then? You don't know whether, for example, if you worked -- more than 25 percent of your work is at a GS-13 level, if you should receive a temporary promotion to that GS-13 level?

MR. ZEBOT: I have an objection just as far as clarification. When you say "at a GS-13 level," you're not saying officially the GS-13 position.

MS. SHECTER: No.

MR. ZEBOT: But just what somebody believes would be work that a GS-13 might do; is that it?

MS. SHECTER: Yes.

THE WITNESS: Do they have to be temporary promoted to the Grade 13; is that your question?

MS. SHECTER: Yes, on a temporary -- even on temporary basis.

THE WITNESS: No.

BY MS. SHECTER:

Q They do not?

A They do not.

Q There is no such requirement?

A No, because it could be considered a detail to a higher graded work, and they could be detailed to that position.

Q Then that would be called detailed to that position, wouldn't it?

A Right.

Q Is there a difference between being detailed to a position and being on a temporary promotion?

A Well, a temporary promotion, you would receive the salary of the higher grade.

Q And a detail you don't?

MR. ZEBOT: If you're not sure, please indicate.

THE WITNESS: I'm not sure. I'd have to look that up.

BY MS. SHECTER:

Q These announcements for positions, do you send them outside the district as well?

A No. We send them to the other post of duties, you know.

Q Within your district?

A Yes.

Q But you don't send them outside your district?

A We send them to -- we do send some to regional inspection and to our appeals office.

Q What's regional inspection?

A It's our regional inspection office under the central region, but they're in Detroit, in our Detroit office.

Q Then how do you let people outside

the district know that there are positions available?

A They have to come down and look at our bulletin boards or call office of personnel management and they have a listing of all the positions.

Q When an individual goes out now on worker's disability compensation, at that point when they're leaving for it, do you give them any indication of what their rights are or what their rights would be on returning to work?

A I don't. I don't know if somebody else in personnel does.

Q That's your program though, isn't it? So the people in your program, you don't?

A See, I haven't had.

Q Well you said you've had these traumatic injuries. You testified to that.

A Okay. So...

Q So if someone goes out whose folder you have on a traumatic injury, do you yourself ever give them any indication of what their rights would be?

A Oh, sure. I tell them what forms I need.

Q That's for the worker's comp?

A Right.

Q What else do you tell them?

A I inform them what type of leave they're entitled to.

Q Which is?

A Which is -- if it's a traumatic injury, they're entitled to a FECA

leave, which is 45 days of pay.

Q What else do you tell them?

A Mainly what forms they need to submit to personnel.

Q For what purpose?

A To submit to the Department of Labor for the approval of their claim.

Q Anything else?

A We advise the employee information from them.

Q About their comp claim?

A Uh-huh, or If the forms they have submitted are incomplete or not completed properly.

Q Anything else?

A Not that I can recall.

MS. SHECTER: Thank you. I have no further questions.

MR. ZEBOT: I have no Questions.

(Whereupon, the deposition was concluded at about 2:55 p.m.)

STATE OF MICHIGAN)

COUNTY OF WAYNE)

I certify that this transcript, consisting of 72 pages, is a complete, true, and correct record of the testimony of Sharon Hays, taken in this case on Wednesday, March 7, 1990.

I also certify that prior to taking this deposition, Sharon Hays was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or

financially interested in the action.

March 14, 1990

Marcia M. Muonio,
CSMR-4084
P.O. Box 52522
Livonia, Michigan 48152

My Commission expires: August 11, 1992

EXHIBIT I

This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES E. GAVETTE, Petitioner, v. OFFICE OF PERSONNEL MANAGEMENT, DEPARTMENT OF TREASURY, Respondents.	) Appeal) No.) 84-) 1286) MSPB) Docket) No.) CH831L) 8210432) Mar. 28) 1984

DECIDED: February 1, 1985

Before MARKEY, Chief Judge, RICH, Circuit Judge, and COWEN, Senior Circuit Judge.

COWEN, Senior Circuit Judge.

DECISION

The final decision of the Merit Systems Protection Board (MSPB or Board), which upheld petitioner's involuntary disability retirement from

his position in the Internal Revenue Service (IRS) is reversed and the case is remanded.

OPINION

I.

In April 1979, petitioner, a GS-12 revenue agent in the IRS, successfully, applied to be placed on the promotion roster for GS-13 positions. Throughout the 18 years he had worked for the agency, be had consistently received performance ratings of satisfactory or better. Dissatisfied at his placement at the bottom the promotion roster, on June 6, 1979, he filed a grievance, through his union steward. He claimed that his group manager (supervisor) had not evaluated his work fairly and requested

a revaluation.

After this grievance was filed, tensions between petitioner and his group manager rose sharply. Between June 14 (when an employees' meeting took place in which petitioner publicly aired his grievance) and July 13, the supervisor drafted six memoranda critical of petitioner's job performance. On June 20, petitioner filed a second grievance, complaining that the critical memoranda were harassment and intimidation in retaliation for his first grievance. Between July 23 and July 30, 1979, the supervisor drafted seven more memoranda; highly critical of petitioner's performance. These negative memoranda

contrasted markedly to the supervisor's comments on petitioner's performance in a workload review dated June 5, 1979 (the day before petitioner filed his first grievance), which stated, "keep up the fine Job Charlie."

During (the 2-month period following the filing of his first grievance, petitioner began to suffer increasingly from an emotional disturbance, which he had had since 1976.

The agency then determined, on August 28, 1979, that petitioner should undergo a psychological fitness-for-duty examination. Petitioner consulted a board-certified psychiatrist, Dr. Warren W. Goodwin, in October and November

1979. Dr. Goodwin's report showed a diagnosis of "acute anxiety reaction super-imposed upon an obsessive-compulsive personality pattern with mild to moderate defensive paranoia." The report stated, however, that petitioner "has many good qualities which proper management could develop into very productive results from him. Dr. Goodwin recommended that petitioner be "transferred out of the whole area of employment conflict," and stated that the new supervisor should be skilled at working with his strengths and weaknesses.

The agency sought clarification of Dr. Goodwin 'a report in a letter which stated that two of petitioner's previous

group managers "had identified deficiencies in his performance." The letter also stated that the only other manager at petitioner's post of duty was "relatively new to his position," and that it had "no reason to believe" that assignment to this manager would improve petitioner's performance. In response, Dr. Goodwin wrote a second letter to the IRS in January 1980, stating that because it was not possible for the agency to provide the minimum conditions he had recommended, petitioner must be considered unfit for duty.

On March 25, 1980, the agency notified petitioner that it intended to file an application with OPM for his disability retirement. Petitioner

opposed the application. and it was rejected by OPM in April 1981, on the ground that the IRS failed to document either a deficiency in service caused by a medical condition or the incompatibility or petitioner's medical condition with useful service in his position.

On June 22, 1981, the IRS filed a request for reconsideration of the OPM decision, in which it set forth six pages of contentions to the effect that petitioner's performance in 1979 demonstrated that his emotional problems rendered him unfit for service. The agency attached a number of memoranda written by petitioner' a group manager in support of the request. On

reconsideration, OPM granted the request for disability retirement in February 1982.

In June 1981, petitioner requested that the IRS furnish him copies of that agency's request for reconsideration and attached documents. The agency refused to provide its request for reconsideration, citing provision of the freedom of Information Act and Privacy Act applicable to interagency memoranda and document prepared in anticipation of litigation. It was not until March 1982, after OPM granted the application for disability retirement, that the IRS reversed its earlier decision and furnished petitioner with the documents he had requested.

Petitioner timely appealed the OPM decision to the MSPB. The presiding official found that a preponderance of the evidence supported the agency's contention that petitioner's psychological problems rendered him totally unfit for Government service, and that the agency's decision did not involve harmful procedural error.

II.

5 U.S.C. 1701(c)(2) (1980) provides that agency decisions may not be sustained if the employee shows harmful error in the application of the agency's procedures in arriving at such decision.

Harmful error is defined in 5 C.F.R. 1201.56(c)(3)(1983) as:

Error by the agency in the application of its procedures which, in the absence or cure of the error might have caused the agency to reach a conclusion different than the one reached. The burden is upon the Appellant to show that based upon the record as a whole the error was harmful and has caused substantial harm for prejudice to his/her rights.

The seminal decision of the MSPB on the section 7701 "harmful error" standard, Parker v. Defense Logistics Agency, 1 MSPB 489, 493 (1980), elaborated as follows on this standard:

Unless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial [citations omitted]. Stated another way, the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error. See Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969).

Although this is a close and difficult case, we conclude that petitioner met his burden by showing that the agency's refusal to furnish him the material submitted in its request for reconsideration of the OPM decision was harmful error within the meaning of the applicable criteria. 5 C.F.R. 831.1203(b) (1983) requires agencies to notify employees in writing of their discrimination that disability retirement for such employees appears to be justified, along with the reason for this determination. Under 5 C.F.R. £ 831.1202(b), the required reasons and findings under section 831.1203(b) must be "specific and detailed." Similar requirements exist under FPM Supp.

831-1-S10-10, the section relied on in petitioner's request for the material the IRS submitted in its request for reconsideration.

The Government contends that the agency's March 25, 1980 notice to petitioner of its intended action satisfied the foregoing requirements. This notice informed petitioner that the basis for its intended action was the outcome of his psychiatric examination. The information contained in this notice was patently insufficient to constitute the basis for disability retirement, however, and was properly deemed as such by OPM. The element missing from the IRS's claim, which was purportedly supplied only in that agency's request

for reconsideration, was evidence that petitioner's job performance was deficient, and that such deficiency was caused by his medical condition. See 5 C.F.R. 831.1203(c)(1)(1980); FPM Supp. 831-1-S10-10.

The agency's refusal to provide petitioner with essential material when he requested it was a clear violation of the spirit, if not the letter, of 5 C.F.R. 831.1202(b) and 5 C.F.R. 1203(b). The fundamental precepts of due process underlying the notice requirements of these regulations would be undermined if agencies are permitted to withhold from their employees the dispositive reasons for seeking involuntary disability retirement.

The harmfulness of the Government's procedural error is demonstrated by the facts of this case. The request for reconsideration by the IRS consisted largely of conclusory statements alleging that petitioner refused to accept direction or criticism from management. These statements were made for the first time by the IRS in its request for reconsideration, and were only inferentially supported, to the extent they were supported at all, by the memoranda of petitioner's supervisor. The IRS utilized its allegations that petitioner was uncooperative with management as support for its contention that the "area of employment conflict" referred to in Dr.

Goodwin's first report was in petitioner's relationship with management in general. Thus, the agency took the position, which it contended was supported by Dr. Goodwin's report, that petitioner was unfit to work under the direction of any supervisor.

However, after petitioner belatedly received the IRS request for reconsideration, he submitted an affidavit to the MSPB in which Dr. Goodwin stated that IRS misinterpreted his report. The "area of employment conflict" out of which he recommended that petitioner be transferred, the psychiatrist stated, was only between petitioner and his group manager. He added that the only reason for his

recommendation that petitioner was unfit for duty was that he had been told that transfer to another group manager was "out of the question," and that the agency was determined to retire petitioner, either through disability or adverse action. In addition, petitioner proffered evidence that he was rated "above accepted standards" in the area of cooperation with management and taxpayers by both his group manager and his previous supervisors.

Once the arguments used by IRS in its request for reconsideration became known to petitioner, be was able to provide substantial evidence to refute them before the MSPB. Even though his more informed arguments ultimately

proved unpersuasive in the de novo review by the Board, they were at least sufficient to make petitioner's case a close one, which might well have been decided differently by OPM.

Thus, we find ourselves faced with an error of the IRS which affected the central issues in this very close case, and that error was not mitigated prior to the OPM decision. This is all the harmful error standard of section 7701 requires.

III.

As an additional ground for our holding, we agree with petitioner that under the circumstances of this case, the failure of the IRS to certify that no positions were available in

petitioner's grade to which he could be reassigned constituted harmful procedural error.

Under 5 U.S.C. 8337(a) (Supp. V. 1981), applicable as of the time the agency requested reconsideration of the initial decision of OPM, an employee was to be considered "disabled" only if not qualified for reassignment, under OPM procedures, to an available position in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. The Government brushes aside this statute on the ground that it was not applicable as of the time of the original application for petitioner's disability retirement. Nevertheless,

the Government concedes that an OPM regulation applicable as of that time (5 C.F.R. § 831.1203(c)(2)) required the agency to certify that no such positions were available, and that the IRS failed to make such a certification in the appropriate place on the Civil Service Commission's Standard Form 2801. The Government argues that this error was harmless, however, because the Board's presiding officer found, based on Dr. Goodwin's reports, that transfer to another position was not feasible.

If the record clearly showed that transfer of petitioner to alternative positions was not feasible, the agency's failure to make a certification to this effect might well have been harmless.

the Government concedes that an OPM regulation applicable as of that time (5 C.F.R. § 831.1203(c)(2)) required the agency to certify that no such positions were available, and that the IRS failed to make such a certification in the appropriate place on the Civil Service Commission's Standard Form 2801. The Government argues that this error was harmless, however, because the Board's presiding officer found, based on Dr. Goodwin's reports, that transfer to another position was not feasible.

If the record clearly showed that transfer of petitioner to alternative positions was not feasible, the agency's failure to make a certification to this effect might well have been harmless.

But this was decidedly not the case. The 1982 affidavit of Dr. Goodwin, whose earlier reports forced the basis of the IRS's initial determination that petitioner was unfit for duty, stated:

> It was my firm opinion (in 1980] and it remains my opinion today that Mr. Gavette could have returned to work at the IRS and likely performed his duties in a very productive manner if the IRS had been willing to reassign him out of the area of employment conflict which redeveloped between him and his group manager.

Moreover the 1980 report of Dr. Goodwin, recommending that petitioner be considered for disability retirement, was in response to an earlier letter from the IRS stating that petitioner's two previous supervisors "had identified deficiencies in performance." However, at that time, Dr. Goodwin did not know

that the affidavits of these two supervisors show that they considered petitioner's performance to be satisfactory or better, in spite of certain deficiencies.

Elsewhere in its letter to Dr. Goodwin, the agency tacitly admitted that it was possible to reassign petitioner elsewhere in the agency, as it said: "The only other manager at Mr. Gavette's post of duty to whom he could be assigned is relatively new to his position * * *." Finally, the agency implied to Dr. Goodwin that petitioner's assignment to a new manager was impossible because its managers "do not receive training to equip them to deal with severe psychological problems." As

Dr. Goodwin emphasized in his later affidavit, however, petitioner, in his opinion, did not have severe psychological problems. Thus, there are substantial indications in the record that transferring petitioner was feasible.

Given the state of the record, we can only speculate as to the reasons for the agency's omission. It is at least "within the range of appreciable probability," however, that the agency never formally determined whether it was feasible to transfer petitioner, and that if it had made such a good-faith determination, it would not have determined that petitioner could not be transferred. See Parker, 1 MSPS at 493.

The statement of IRS officers, noted in Dr. Goodwin's affidavit, that the agency wished either to retire petitioner for disability or remove him by adverse action, adds weight to the possibility that the agency did not seriously consider whether a transfer was feasible.

The House Budget Committee, in recommending the passage of 5 U.S.C. 8337(a), noted:

> If [a disabled] employee is able to perform useful and efficient service in another position and a vacancy exists, the employee must be reassigned rather than retired.

H.R. Rep. No. 1167, 96th Cong., 2d Sess. 206 (1980) [Emphasis added].

In light of this clear statement of Congressional intent and the distinct possibility in petitioner's case that a

transfer was feasible, we hold that the agency's failure to certify that transfer was impossible was harmful procedural error.

III.

In his appeal to this court, petitioner sought reinstatement to his former position. However, at oral argument his counsel stated that petitioner has abandoned his claim for reinstatement and desires to retain his status as an employee retired for disability. However, he renewed petitioner's request for an award of back pay, and for reasonable attorney's fees. Accordingly, this case is remanded to the Board with instructions that petitioner be awarded the

difference between the salary he would have received had he remained on active duty and the disability retirement pay he has received to the date of judgment, and any other relief to which he is entitled in accordance with this opinion, less any earnings he has received from other employment in the interval. Petitioner's right to recover attorney's fees is a question which is not before us and we intimate no opinion on his entitlement to such fees.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES E. GAVETTE, Appellant, DOCKET NUMBER CH03538810382 v. DEPARTMENT OF THE TREASURY, DATE: _____ Agency.	)

Lynn H. Shecter, Esquire, Roy, Shecter, and Vocht, Birmingham, Michigan, for the appellant.

John Freeman, Esquire, Cincinnati, Ohio, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Chairman Levinson issues a separate opinion.

OPINION AND ORDER

This case is before the Board upon both the agency's and the appellant's petitions for review of the administratiave judge's August 19, 1988 initial decision, ordering the agency, inter alia, to consider the appellant for promotions in accordance with his restoration rights. For the reasons discussed in this Opinion and Order, the Board DENIES the agency's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board GRANTS the appellant's petition for review, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still REVERSING the agency

action.

BACKGROUND

The appellant, a GS-12, Revenue Service Agent with the Internal Revenue Service (agency), appealed to the Chicago Regional Office of the Board, alleging, inter alia, that the agency failed to inform him of his restoration rights, improperly refused to restore him to duty by not promoting him to a GS-13 "CEP Team Coordinator" position, and discriminated against him based on age and physical handicap.

This appeal arose out of a series of events spanning several years. On September 7, 1979, the agency initialed the filing of a claim with the Department of Labor, Office of Workers'

Compensation Programs (OWCP), for benefits for the appellant based on emotional illness caused or aggravated by his employment. See Appeal File, Tab 25. The "Official Superior Officer's Report of Occupational Disease" that accompanied the application indicated that the appellant first reported his condition to his supervisor on August 3, 1979, and discontinued August 30, 1979. Id. On April 29, 1981, OWCP denied the appellant benefits. However, on August 13, 1982, it granted him retroactive benefits from August 3, 1979, to May 7, 1982. Id.

Meanwhile, in 1980, the agency applied, on the appellant's behalf, to the Office of Personnel Management (OPM)

for disability retirement, which the appellant opposed. OPM initially denied the application in April 1981 but subsequently granted it, upon reconsideration, in February 1982. The appellant appealed OPM's reconsideration decision to the Board, which sustained that agency's determination. See Gavette v. Office of Personnel Management, 20 M.S.P.R. 180 (1984).

In an unpublished opinion, the United States Court Appeals for the Federal Circuit reversed the Board's decision, finding that the agency's failure to furnish the appellant certain material he requested, which the agency had submitted to OPM upon its request for reconsideration, and the agency's

failure to certify that there were no available positions to which the appellant could be reassigned, constituted harmful procedural error. See Gavette v. Office of Personnel Management, 765 F.2d 158 (Fed. Cir. 1985) (table); No. 84-1286, slip op. at 8, 11; Appeal File, Tab 18. In his appeal to the Federal Circuit, the appellant initially requested reinstatement to his former position but subsequently abandoned that claim and opted for disability retirement instead. See Gavette, slip op. at 11. The court therefore remanded the case to the Board, directing that the appellant be awarded the difference between the amount of pay he would have received had

he remained in active duty status and the amount of the amount of disability retirement pay he had received up to the date of judgment (February 1, 1985), as well as any other relief to which the appellant was entitled. Id. at 12.

On December 23, 1985, the appellant filed for OWCP benefits for disabling emotional illness commencing on January 25, 1985. See Appeal File, Tab 15. The appellant asserted that his condition was caused by the agency's involuntary disability retirement action and subsequent administrative and judicial proceedings relating to his difficulties with the agency. OWCP denied that claim on June 24, 1986, but subsequently granted it on September 16, 1987, for

the period from January 25, 1985, until January 8, 1986, when it found that the appellant was able to work without limitation based on a January 20, 1986 medical report from his psychiatrist, Dr. Warren Goodwin. Id.

On January 27, 1986, the appellant applied to the agency for restoration. See Appeal File, Tab 1, Exhibit B. On February 20, 1986, the agency denied his request on the basis that he was still disabled and that it had no available revenue agent positions. Id., Exhibit C. Following OWCP's September 16, 1987 approval of his 1985 claim for benefits, the appellant renewed his request for restoration by filing a copy of his previous January 27 request,

which the agency received on October 13, 1987. Id., Exhibit D. The appellant asserted that he had recovered within one year of the onset of his January 25, 1985 injury. On March 30, 1988, the agency also denied this restoration request, which is the subject of the instant appeal.

Subsequent to the appellant's filing of the petition for appeal in the present case, the parties entered into a settlement agreement, effective June 1, 1988, in a related civil action filed by the appellant against the agency in the United States District Court for the Eastern district of Michigan (C.A. No. 84-CV-4109-DT). See Appeal File, Tab 15; "Stipulation for Compromise Settlement."[1]

Initial Decision

After duly noting the parties' stipulations, the administrative judge found that the agency failed to

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[1] The agreement provided in pertinent part in paragraph 8 II as follows:

The SECRETARY (of the Department of the Treasury] understands that MR. GAVETTE reserves any and all rights which may have accrued to him as a federal employee under the United States Department of Labor, Employment Standards Administration, Office of Worker's Compensation Programs (OWCP) as well as pursuant to 5 U.S.C. §8151 and Federal Personnel Manual Chapter 353, including any right of Equal Employment Discrimination Complaints with respect to alleged IRS violation of any and all rights pursuant to 5 U.S.C. §8151 and Federal Personnel Manual Chapter 353.

The agency moved to dismiss the appellant's appeal based on the settlement agreement. The administrative judge denied the motion, finding that the "parties expressly reserved any rights that may have accrued to appellant under 5 U.S.C.A. §

8151(b)(1) (West 1980) and Chapter 353 of the Federal Personnel Manual for review by the Board." Appeal, File, Tab 14; "Order Concerning Timeliness of Appeal, Denying Agency's Motion to Dismiss, and Establishing Close of Record Date" at 1-2. The agency has not challenged this ruling on review.

establish that it had complied with 5 U.S.C. § 8151(b)(1)[2] in considering the appellant for all promotions at the GS-13 grade level or higher, based on his qualifications. Specifically, he found that: (1) In light of 5.U.S.C. § 8151, the February I, 1985 Federal Circuit decision constructively restored the appellant from May 7, 1982, when his initial OWCP benefits ceased, to the date of the court's judgment (February 1, 1985); (2) the agency could not collaterally attack OWCP's September 16,

1987 determination that the appellant had suffered a recurrent illness due to an employment-related factor because, under 5 U.S.C. § 8149, the Secretary of Labor is exclusively charged statutorily with the responsibility for making such determinations;

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[2] 5 U.S.C. § 8151 (b)(1) provides in pertinent part that, consistent with implementing regulations of the Office of Personnel Management:

> (1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as

> all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure, promotion, and safeguards in reductions-in-force procedures

(Emphasis supplied.)

(3) under 5 U.S.C. § 8151(b)(1) and Hogg v. United States Postal Service, 29 M.S.P.R. 153 (1985), the appellant was therefore entitled to attendant restoration rights because he had overcome a compensable disability within one year of the commencement of benefits for its recurrence; under 5 C.F.R. 353.301 (1987), which was in effect at the pertinent times concerned, the appellant was entitled to consideration for all promotions for which he would

have been considered but for his absence based on his compensable injury; (5) because there was nothing in 5 C.F.R. § 353.201 to limit an employee's consideration for promotion only to the period during which he received OWCP compensation, the agency was required to also consider the appellant for promotions after January 8, 1986, through the date he applied for restoration, October 13, 1987; (6) under Withers v. Department or the Air Force, 28 M.S.P.R. 379, 385 (1985), and Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227 (1984), the agency was also required to consider the appellant for promotions nationwide or indicate why it was

precluded from giving such consideration; (7) the appellant failed to prove age discrimination because, although he established that he was over 40 years of age, and was thus in the protected age group, he did not show that age was a factor in the agency's actions; and (8) the appellant also did not prove handicap discrimination because, although he showed he was a handicapped individual, he did not show that he was a qualified handicapped person because he failed to produce evidence of the performance requirements for the GS-13 Team Coordinator position, to which he asserted he was entitled to be promoted, or to show that he was qualified for, and able to perform, the

duties of that position. Accordingly the administrative judge ordered, inter alia: that the agency consider the appellant for any GS-13 position or higher for which he would have been considered, had he been present, for the period fro- January 25, 1985, through October 13, 1987; and that the agency "make every effort to restore [the] appellant to an acceptable higher graded position if such restoration would be in accord with the agency's merit promotion plan." See Initial Decision at 19.

The Parties' Petitions for Review

The agency petitions for review, contending that the administrative judge erred in: (1) Considering evidence submitted by the appellant to which it

did not have an opportunity to respond; (2) finding that the appellant was entitled to benefits under 5 U.S.C. § 8151; (3) finding that section 8151 required it to consider the appellant for competitive promotions; and (4) finding that section 8151 required the agency to consider the appellant for competitive promotions before he claimed compensation benefits.

The appellant has also petitioned for review, contending that the administrative judge erred in: (1) Finding that, because the appellant failed to establish the performance requirements for the GS-13 Team Coordinator position, he did not prove that he was qualified to perform the

duties of that position; (2) finding that the appellant failed to prove his allegation of handicap discrimination; (3) stating that, in its decision on the appellant's involuntary retirement appeal, the Federal Circuit constructively restored the appellant to his position from May 7, 1982, when his first period of compensation payments ceased, until February 1, 1985, the date of the court's judgment; and (4) prescribing an illusory remedy in ordering the agency to consider him for promotions. The agency has responded to the appellant's petition, challenging his contentions.

ANALYSIS

The Agency's Petition for Review The Administrative Judge's Establishment of Separate Dates for Receipt of the Parties' Final Submissions Did Not Prejudice the Agency's Substantive Rights.

First, the agency contends that the administrative judge erroneously considered evidence submitted by the appellant to which it did not have an opportunity to respond. The agency challenges the administrative judge's August 2, 1988 order governing the parties' final written submissions. See Appeal File, Tab 14. The agency contends that the order required that the agency's final submissions be sent

by express mail on or before August 12, 1988, but required that the appellant's final submissions be sent, also by express mail, to the administrative judge, on or before August 16, 1988. The appellant's submissions were to have been received by the board and the agency no later than August 17, 1988. Id. The agency argues that the order, in effect, permitted the appellant to review and respond to the agency's submissions but denied the agency a similar opportunity. It asserts that the initial decision was issued on August 19, 1988, but that it did not receive a copy of the appellant's submissions until on or about August 29, 1988, and did not receive all of the

attachments to the appellant's submissions until September 8, 1988. It further asserts that the administrative judge relied on unspecified new and material evidence in the submissions, i.e., an April 15, 1988 letter from OPM's Chicago office.

Under 5 C.F.R. § 1201.41, an administrative judge is required to conduct fair and impartial proceedings and is endowed with broad discretionary authority in executing this mandate. In a case such as the instant one, where the appellant waives a hearing, the record closes on the date set by the administrative judge as the final date for the receipt of submissions by the parties. 5 C.F.R. § 1201.58(b) The

deadline for closing the record is within the sound discretion of the administrative judge. See Schultz v. Consumer Product Safety Commission, 10 M.S.P.R. 104, 106 (1982). However, where an appeal is decided without a hearing, the procedures utilized must comport with the basic requirements of fairness and notice, including an opportunity for one party to respond to the opposing party's submissions. Id. Thus, where one party is precluded from responding to material evidence which is included in the opposing party's submission, and upon which the administrative judge relies in the initial decision, such error may warrant reversal of the initial decision. Id.

We note that the agency does not assert, and the record does not indicate, that the agency objected to the different deadlines set by the administrative judge for the receipt of the parties' final submissions. See White v. Department of the Army, 32 M.S.P.R. 600 (1987) (a party cannot wait until after adjudication to object to the administrative judge's rulings). Further, even assuming that the administrative judge erred in this regard, the agency has not shown how the administrative judge's consideration of this evidence prejudiced its substantive rights. See Karapinka v. Department of Energy, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error

is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

As previously noted, the agency has not identified the specific key evidence upon which it asserts the administrative judge relied. See Aistrup v. Department of Transportation, 18 M.S.P.R. 299, 300 n.2 (1983) (5 C.F.R. § 1201.115 requires that a petition for review set forth specific objections to the initial decision). Moreover, our review of the OPM letter (see Appeal File, Tab 18, Exhibit D), indicates that it merely informed the appellant of his restoration rights under the Federal Personnel Manual and former and existing OPM regulations. The agency was at all

times aware of the appellant's contention that it had improperly failed to consider him for promotions in relation to his restoration rights and could easily have obtained similar information in its preparation of its case by reviewing those regulations. Since this information could have been in the agency's possession, it was not new. See Santiago v. Department of the Air Force, 3 M.S.P.R. 457, 459 (1980). Therefore, the agency has not shown a basis upon which the administrative judge's ruling should be reversed.

The Appellant Was Entitled to Restoration Rights Based on the 1985 Recurrence of His Injury.

Next, the agency contends that the

administrative judge erred in finding that the appellant was entitled to benefits under 5 U.S.C. § 8151 based on his 1985 injury. The agency argues that the administrative judge erred in stating that it asserted that the appellant's 1985 injury was not job-related. See Initial Decision at 10. It argues that it asserted, instead, that, while the injury was employment-related, it neither occurred on the job nor was a recurrence of a compensable injury, but was due to stress related to the appellant's "ongoing legal proceedings." Agency's petition for Review at 9, Review File, Tab I. We find this argument unpersuasive inasmuch as OWCP had

already determined that the injury was a recurrence of the appellant's previous compensable injury and the fact OWCP's determination triggered the appellant's restoration rights. See Watson v. Department of the Army, 21 M.S.P.R. 435, 437 (1984); Hardin v. Department of the Army, 18 M.S.P.R. 42, 45 (1983).

The Agency Was Required to Consider the Appellant for Competitive Promotions Pursuant to 5 U.S.C. 8151(b)(1) and 5 C.F.R. § 353.201(a).

The agency also contends that the administrative judge erred in finding that 5 U.S.C. § 8151 required it to consider the appellant for competitive promotions. It argues that the parties' stipulation that the appellant had been

restored to his position of Revenue Agent (GS-12, step 13, journeyman level), and had been awarded all within-grade salary increases for which he would have been eligible, satisfied restoration requirements. See Appeal File, Tab 15, "Stipulation for Compromise Settlement" at 1. The agency contends further that the appellant bore the burden of proving that he would have been considered for competitive promotions under OPM regulations in effect at the pertinent time period and that he would have been selected for those promotions. In support of this contention, the agency relies on Naekel v. Department of Transportation, 850 F.2d 682 (Fed. Cir. 1988) and Boese v.

Department of the Air Force, 784 F.2d 388, 390 (Fed. Cir. 1986).

We find Naekel and Boese inapposite inasmuch as they do not concern the restoration rights of employees following a compensable injury under 5 U.S.C. 8151(b)(1) and 5 C.F.R. Part 353. Rather, they involve the employees' reinstatement rights following reversal or mitigation of adverse actions effected under 5 U.S.C. Chapter 75. We note that there is no provision in Chapter 75 and its implementing regulations, nor in the Back Pay Act, 5 U.S.C. § 550.801 et seq., that grants employees any right to promotion consideration during the period they are off the agency's rolls. Thus, in Naekel

and Boese, the court rejected the employees' contention that they were entitled to promotion rights and benefits, finding that, in the absence of a provision of law mandating a promotion during the period the employees were off the agencies' rolls, or the employees' clear showing that they would have been promoted, they were not entitled to promotion. See Naekel, 850 F.2d at 683-84; Boese, 784 F.2d at 390.

Under 5 U.S.C. § 8151(b)(1), however, an agency is required to accord a restored employee any promotion rights he would have had but for his compensable injury or disability. See note 2, supra. Additionally, 5 C.F.R. §

353.201(a) (1987) provides in pertinent part that "[e]ach agency shall consider every employee absent because of compensable injury or military duty for all promotions for which he would be considered were he not absent." The regulation does not require actual promotion, only consideration for promotions. There is no requirement that regulation that the employee prove that he would have been considered or selected for any promotion. As administrative judge correctly pointed out, See Initial Decision at 11, it is the agency that bears the burden proving that it has complied with the restoration requirements of 5 C.F.R Part 353. See Metsopulos v. United States

Postal Service, 33 M.S.P.R. 536, 539 (1987); Whitfield v. United States Postal Service, 5 M.S.P.R. 239, 242 (1981).

We stated in Whitfield at 242, that, "[c]onsistent with the agency's burden of proof in appeals before the Board, 5 U.S.C. § 7701(c)(1), the agency must submit evidence regarding all such available positions, and any restrictive qualification requirements" to show that it complied with 5 C.F.R. part 353. The statutory provision at issue in Metsopulos and Whitfield was 5 U.S.C. § 8151(b)(2), which concerns the agency's obligations in restoring an employee who takes longer than one year to overcome a compensable injury or disability.

However, 5 U.S.C. § 8151(b)(1), with which we are concerned here, imposes an additional burden on the agency to show that it considered for applicable promotions an employee who recovered within one year from a compensable injury or disability. See note 2, supra. The administrative judge properly found that the agency did not meet its burden of showing that it considered the appellant for promotions. See Initial Decision at 14.

Agency Was Required to Consider the Appellant for Competitive Promotions Nationwide From the Date of the Recurrence of the Appellant's Injury Until the Date the Agency Permitted Him to Return to Work.

The agency contends that the administrative Judge erred in finding that 5 U.S.C. § 8151 required it to consider the appellant for competitive promotions both before he claimed compensation benefits and after those benefits ceased. Specifically, it contends that the administrative judge erroneously required it to consider the appellant for competitive promotions from the time of his disabling condition in January 1985, but before he sought compensation benefits on December 23, 1985, and after those benefits ceased.

We find no merit to this contention. The appellant was entitled to restoration rights and benefits for "the entire time during which [he] was

receiving compensation" for his injury, i.e., January 25, 1985, to January 8, 1986. See 5 U.S.C. § 8151(a). The agency has cited to no authority requiring otherwise.

Since OWCP did not grant the appellant's claim based on recurrence of a compensable injury until September 17, 1987, the appellant could not have applied for restoration based on the recurrence of his injury prior to that time, as there was no finding of a compensable injury upon the recovery of which the right to restoration attached. See 5 U.S.C. § 8151(a); 5 C.F.R. § 353.201 and § 353.303 (1987); Johnson v. United States Postal Service, 29 M.S.P.R. 138, 140 (1985) (entitlement to

restoration rights is based upon a showing that the employee suffered a compensable injury); Cox v. U.S. International Trade Commission, 6 M.S.P.R. 336, 337-38 (1981) (where OWCP does not officially notify an employee that an injury is compensable until after the employee has recovered, the employee's application for restoration upon receipt of such notice is timely). Also, OWCP's delay cannot operate to defeat an employee's right to restoration where the employee is not responsible for the delay. Id. at 338. Here, the appellant applied for restoration within 30 days of receiving September 16, 1987 determination granting his claim. See Appeal File,

Tab 1, Exhibit D. Therefore, his appeal was timely, and he was entitled to restoration immediately. See 5 C.F.R. § 353.302(b) (1987).

We disagree with the administrative judge's finding that the agency was required to consider the appellant for promotion only up to the date he applied for restoration, October 13, 1987. Under 5 U.S.C. § 8151(b) (1), the appellant was entitled to consideration for promotion just as he would have been "had he not been injured or disabled." See note 2, supra. Had the appellant not been disabled, he would not have been in a non-duty status between January 25, 1985, and the date the agency permitted him to return to work.

Thus, he was entitled to consideration for promotions for that period as though he had not been absent because of his compensable injury. Id. Also, the agency was required to consider the appellant for promotions on a nationwide basis. See Withers v. Department of the Air Force, 28 M.S.P.R. at 385 (an agency is required to consider both partially and fully recovered employees for restoration to suitable positions on a nationwide basis).

Further, we note that, in paragraph 2 of their "Stipulation for Compromise Settlement," the parties agreed that the agency would cancel the appellant's disability retirement and reinstate him to his GS-12 Revenue Agent position, as

if he had remained on active duty, and would afford him attendant rights and benefits. See Appeal File, Tab 15. The agreement expressly provided that the appellant reserved to himself "any and all rights" to which he would be entitled as a Federal employee, including his rights under OWCP, 5 U.S.C. § 8151, and Chapter 353 of the Federal Personnel Manual. Id., note 1, supra. Thus, under the agreement, the appellant was not precluded from pursuing his restoration rights.

The Appellant's Petition for Review The Appellant Failed to Meet His Burden of Proving Handicap Discrimination Because He Failed to Show that He was a Qualified Handicapped Individual.

As to his petition for review, the appellant first contends that the administrative judge erred in ruling that he failed to show the performance requirements for the Team Coordinator position. He asserts that the agency failed to produce job descriptions and produced only the required qualifications for the position and the job postings. He argues that an employee has no duty to inform an agency of the performance requirements for its own position; that the qualifications listed in the announcement for the vacancy for that position stated its duty requirements; that his 18 years of satisfactory service demonstrated experience and skill, thus relieving him

from any obligation to show special competency or skill; and that, since the administrative judge acknowledged that he (appellant) was placed on the promotion roster, he should have found that the appellant was qualified for promotion.

The administrative judge's finding that the appellant failed to produce evidence of the performance requirements for the GS-13 Team Coordinator position related to the issue of whether the appellant had shown that he was a qualified handicapped person. See Initial Decision at 17-18. Thus, we will address this contention together with the appellant's contention that the administrative judge erred in finding

that he failed to prove handicap discrimination. Since the appellant alleged handicap discrimination, it was he, and not the agency, that had the burden of proof on this issue. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (although the burden of persuasion in an employment discrimination case is always on the employee, the burden of going forward with the evidence shifts; the employee has the initial burden to establish a prima-facie case; the burden then shifts to the employer to rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for its action; finally, the burden shifts back to the employee to show that the

employer's articulated reason is merely a pretext for prohibited discrimination).

In Savage v. Department of the Navy, 36 M.S.P.R. 148, 152 (1988), the Board, while recognizing that the elements necessary to establish a prima facie case of handicap discrimination may vary according to the particular facts and circumstances of a case, stated that, generally, an appellant can establish a prima facie case of handicap discrimination by: (1) A showing that he is a handicapped person and that the action appealed to the Board was based on his handicap; (2) to the extent possible, articulation of a reasonable accommodation under which the appellant

believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned.

In the instant case, the parties do not dispute the administrative judge's finding that the appellant was a handicapped individual within the meaning of 29 C.F.R. § 1613.702(a). See Initial Decision at 16-17. However, we find no evidence that the agency's failure to promote the appellant to the GS-13 position was based on his handicap. In fact, the agency specifically stated in its March 30, 1988 letter that it was denying the appellant restoration because his 1985 injury was unrelated to his earlier

compensable injury and, therefore, did not invoke restoration rights. See Appeal File, Tab I; Exhibit A. Further, even assuming that the agency action in failing to consider the appellant for the GS-13 position was based on his handicap, we find that the appellant failed to make out a prima facie case of handicap discrimination because he did not show that he was qualified for the position. We reject the appellant's contention that, because he had been placed on the promotion roster, the administrative judge should have found him qualified. Even if the appellant met the experience and educational requirements for promotion to the GS-13 position in 1979,[3] since he was claiming

handicap discrimination, he was required to show that, despite his handicap,[4] he could perform the essential duties of the G5-13 position with or without reasonable accommodation. See 5 C.F.R. § 1613.702(f). The appellant did not meet this burden. See Appellant's Petition for Review at 1-2.[5]

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[3] The appellant contends that, as part of the June 1, 1988 settlement agreement with the agency, he was entitled, based on the agency's past discriminatory practices against him, to retraining as an accommodation to make him current on changes in the law and in IRS procedures during his nine year absence from the agency. See Appellant's Petition for Review at 4-5, Review File, Tab 3. We note that the agency challenges this assertion, stating that the retraining related only to the appellant's absence, and not to any discrimination based on a handicapping condition. See Agency's Response to Appellant's Petition for Review at 6-7; Review File, Tab 5. Moreover, a review of the agreement

shows that the provision relating to training did not refer to accommodation, but, rather, stated that the appellant would receive the same training as is given to individuals new to the position of revenue agent. See Appeal File, Tab 15, para. 2.

[4] The appellant was required to show, as part of his burden of establishing a prima facie case of handicap discrimination, that he was mentally qualified for the position. See Savage, 36 M.S.P.R. at 152. The only medical evidence submitted by the appellant was the January 8, 1986 report by Dr. Goodwin, stating that the appellant had fully recovered from his emotional illness. See Appeal File, Tab 15. The report related solely to the appellant's ability to perform the duties of the GS-12 Revenue Agent position. Thus, it did not establish that the appellant could perform the duties of the GS-13 Team Coordinator position or any other GS-13 position.

[5] In his petition for review, the appellant contends that the qualifications for the GS-13 position were stated in an announcement referenced by the administrative judge. A copy of this announcement is not included in the record, however. While the appellant states that the

administrative judge specifically refers to the announcement in the initial decision, citing to the record, we note that the administrative judge merely cited to the appellant's brief in identifying the grade and title of the GS-13 position at issue. See Initial Decision at 17.

Therefore, we find that the administrative judge properly concluded that the appellant failed to meet his burden of proving discrimination based on his handicapping condition.[6]

The Administrative Judge Did Not Order an Illusory Remedy.

The appellant contends that the administrative judge erred by prescribing an illusory remedy. He asserts that the remedy merely required the agency to consider him for

promotions and did not require good faith consideration or provide for sanctions in the event that the agency acted in bad faith in its consideration. He contends that the administrative judge should have ordered the agency to promote him because, otherwise, the agency was left with the discretion to determine the position to which the appellant should be restored and whether he should be promoted.

We find no merit to the appellant's contentions. Under 5 C.F.R. § 353.201(a) (1987), the agency is reguired only to "consider every employee absent because of compensable injury . . . for all promotions for which he could be considered were he not

absent." Implicit in this provision is the requirement that the agency act in good faith.

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[6] The appellant also contends that the administrative judge erred in stating that the Federal Circuit constructively restored him to his position from May 7, 1982, when his first period of compensation ceased, until the date of that court's judgment on February 1, 1985. Since we have already found herein that the appellant was entitled to be considered for promotions up to the time of his return to duty, we need not address this contention further.

If the appellant believes that the agency has failed to do so, he has the right to seek enforcement of the Board's order. The fact that the administrative judge did not specifically order the agency to promote the appellant does not render illusory the remedy which the

administrative judge ordered. Further, as we have noted, supra, there is no requirement under 5 C.F.R. Part 353 that the agency promote an employee who recovers within one year of a compensable injury. The only requirement is that the agency consider the employee for applicable promotions. Therefore, the appellant has not shown error here by the administrative judge.[7]

ORDER

The agency is ORDERED to consider the appellant, nationwide, for restoration to positions at the GS-13 grade level or higher for which he would have been considered had he been present from January 25, 1985, to the date he was permitted by the agency to return to

work, pursuant to the parties' settlement agreement. The agency must identify positions on a nationwide basis retroactive from January 25,

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[7] We also note the appellant's assertion that the agency improperly failed to grant him sick leave after the Federal Circuit reversed his disability retirement. See Appellant's Petition for Review at 6; Review File, Tab 3. In Barger v. Department of Justice, 11 M.S.P.R. 170, 176 (1982), we stated that the reasons for an agency's decision to deny leave are reviewable by the Board in an appeal from a disciplinary action which is within the Board's jurisdiction, and which is based on absence without leave (AWOL). Since the agency's alleged denial of sick leave in the instant case does not involve a disciplinary action based on AWOL, it is inappropriate for the Board to review it.

to the date the appellant returned to work. The agency must also determine whether the appellant was qualified for

those positions based on his recovery from his emotional illness. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within 20 days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant, if applicable, for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all

necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's

notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W., Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days

after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See, 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if

you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the

Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF CHAIRMAN LEVINSON

I write separately to address in detail two issues raised by the agency in its petition for review.

I. The appellant's entitlement to benefits under 5 U.S.C. § 8151

Under the statute, the appellant is entitled to restoration rights, including the right to promotion, if the recurrence of his injury began after he "resume[d] regular full-time employment with the United States." 5 U.S.C. § 8151. The Department of Labor (OWCP) approved worker's compensation benefits for the appellant on the basis of a recurrence of his emotional injury, covering the period from January 25, 1985, to January 8, 1986. Nevertheless,

the agency argues that the appellant was not entitled to restoration rights because he had not resumed regular full-time employment before his disability recurred. The majority opinion does not specifically address this contention, but simply treats OWCP's decision of entitlement as dispositive.

As the Board noted in Denny v. Department of the Navy, MSPB Docket No. SF03538810389, slip op. at 8-9, (Jan. 19, 1990), neither 5 U.S.C. § 8151 nor its legislative history defines the term "regular full-time employment." Under the circumstances of this case, however, I believe that the appellant may be deemed to have "resumed regular

full-time employment" with the agency at the time of the recurrence of his injury by virtue of the Federal Circuit's order in Gavette v. Office of Personnel Management, 765 F.2d 158 (Fed. Cir. 1985) (table); No. 84-1282, slip op. at 11-12. See majority opinion, at 3. As the agency notes, the appellant had not actually returned to the performance of his duties prior to the January 1985 recurrence of his injury. But he was precluded from doing so by the agency, and that action was reversed by the court. By prevailing before the Federal Circuit and being awarded the attendant relief of appropriate back pay "and any other relief to which he is entitled in accordance with this opinion," the

appellant was entitled to be placed as nearly as possible in the status quo ante. See Kerr v. National Endowment for the Arts, 726 F.2d 730, 733 (Fed. Cir. 1984). Thus, I agree with the majority's conclusion that the appellant is entitled to benefits afforded under 5 U.S.C. § 8151.

III. Whether the agency was required to consider the appellant for competitive promotions pursuant to 5 U.S.C. § 8151(b)(1) and § 353.201(a).

While I concur with the result reached by the majority on this issue, the agency's argument that it should not be obliged to consider the appellant for competitive promotions as well as for those that would have been made under a

career ladder warrants additional discussion. The OPM regulation in effect during the relevant period, 5 C.F.R. § 353.201(a) (1987), was ambiguous.* In pertinent part, it required agencies to "consider every employee absent because of compensable injury or military duty for all promotions for which he would be considered were he not absent." (Emphasis added). This could be interpreted to refer only to ordinary progressions up a career ladder and the like. Since an employee would normally be considered for a competitive promotion only if he applied for it, the 'italicized words could arguably rule out competitive promotions, at least in

the absence of proof that the appellant would have applied.

On the other. hand, the regulation could mean, more broadly, that the agency has to identify all promotions made while the appellant was incapacitated, even if they are in wholly different lines of work, determine whether the appellant would have been qualified for them, and consider him for every one for which he qualifies. This would be a very substantial burden, particularly since it would have to be done nationwide under the Board's case law. See Withers Department of the Air Force, 28 M.S.P.R. 379, 385 (1985); Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227

(1984).

OPM addressed this very consideration when it amended 5 C.F.R. Part 353 in 1988. In the supplemental

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* The current version of section 353.201(a) provides:

(a) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or military duty can be considered for promotion.

information accompanying the final regulations, OPM responded to an agency's criticism that it went "too far in giving employees absent because of military duty or compensable injury, the right to be considered automatically for all promotions," as follows:

> The agency pointed out that this places an enormous burden on the

> agency and rarely, if ever, results in a promotion for the employee. We have taken a closer look at this and agree with the agency. Accordingly, we have modified this section to require automatic promotion consideration only when an employee is in a career ladder, in an apprenticeship program, or when his or her position is reclassified at a higher grade. (Emphasis in original).

53 Fed. Reg. 857, 858 (1988). This modification was reflected in new FPM guidance putting a more restrictive gloss on the regulation. FPM CH. 353, Subch. 1-3c3) at 353-4 (Feb. 24, 1988).

From this sequence of events, I infer that OPM itself understood the regulation in effect when the appellant's injury recurred to require consideration for competitive promotions. Accord, Cobb v. Prokop, 557 F.Supp. 391 (D. Mass. 1983).

Accordingly, I join the majority in holding that the agency was obliged to do so.

_____
(Date)

_____
Daniel R. Levinson,
Chairman

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
88-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

NOW COMES Plaintiff, Charles E. Gavotte, by and through his attorneys,

ROY, SHECTER & VOCHT, P.C., and moves for Summary Judgment on the issue of liability for the reason that there is no disputed issue of material fact.

1. The specific material fact on which Plaintiff bases his motion is the refusal of the Defendants, in pursuit of a common employment policy, to fail to advise individuals absent on workers' disability compensation that they are eligible for promotion and that there are specific promotion possibilities available. Those individuals who are not advised of promotion possibilities or that they are eligible for promotion do not fill out interest cards which could say they want promotions, because they do not have a reason to do so.

Defendants have taken the position in this lawsuit that failure to fill out an interest card absolves them of liability for failure to advise of promotion eligibility and of specific promotion possibilities. Thus, Defendants have maintained they could not have discriminated against Plaintiff because of his handicap, because he failed to fill out interest cards. See Affidavit of Plaintiff, Charles Gavette and Exhibit A, Defendants' Response to Merit System Protection Board's Order.

2. Defendants, however, have discriminated on the basis of Plaintiff's handicap because those who are suffering from handicaps which result in workers' disability

compensation absences are treated differently from those who are present.

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[1] References to Defendants' position are based on the briefs filed in the case at bar.

All persons who are present receive notification of their eligibility for promotions and the availability of these promotions. Those absent because of workers' disability compensation do not.

3. Defendants attempt to defend against this discrimination by claiming that they did not have to notify Plaintiff because he was not immediately adjudicated eligible for workers' disability compensation. This distinction permits Defendants to evade the regulations concerning promotions

simply by contesting workers' compensation eligibility. Further, there is no regulation permitting non-notification of availability and promotion opportunities to persons who are handicapped. Even if there were such regulations, this would also be impermissible handicap discrimination.

4. Plaintiff further states that this court should retain jurisdiction over the original action for the reasons including the position maintained by Defendants in Exhibit A, which demonstrate a distortion of the ruling of the Merit System Protection Board decision and a continuing pattern of handicap discrimination.

WHEREFORE, Plaintiff prays this

Honorable Court grant its motion for summary judgment on the issue of liability for discrimination.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
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CHARLES E. GAVETTE,

Plaintiff,

Case No:
89-CV-71021-DT

vs.

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SECRETARY OF THE UNITED STATES,
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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

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Whitfield v United States Postal Service, 5 MSPB 239 (1981) 8, 9

QUESTIONS PRESENTED

I. DEFENDANTS HAVE ADMITTED THEY DO NOT PROVIDE HANDICAPPED PERSONS ABSENT ON WORKER'S DISABILITY COMPENSATION WITH THE PROMOTION NOTIFICATION PROVIDED TO PERSONS WHO ARE NOT HANDICAPPED.

11. PLAINTIFF'S FAILURE TO FILE INTEREST CARDS FOR PROMOTIONS WHEN DEFENDANTS FAILED TO NOTIFY HID OF ELIGIBILITY OF PROMOTIONS DOES NOT ABSOLVE DEFENDANTS OF LIABILITY FOR HANDICAP DISCRIMINATION.

III. DEFENDANTS HAVE DISCRIMINATED AGAINST PLAINTIFF BECAUSE OP HIS HANDICAP AND ARE, THEREFORE, LIABLE WITHOUT PROVING DISPARATE TREATMENT.

STATEMENT OF FACTS

Plaintiff, Charles Gavette, an employee of Defendant, Internal Revenue Service (IRS), had been awarded workers' disability compensation for two distinct periods, August 3, 1979 to May 7, 1982 and January 25, 1985 to January 8, 1986. As a result of the Defendants' failure to comply with requirements to notify him of his re-employment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 USC Section 8151 and FPM 353, Gavette filed two EEOC complaints alleging handicap and age discrimination. When the EEOC canceled his claims, he filed this case.

When he recovered from the second

compensable illness, Plaintiff requested his re-employment rights. Exhibit B, Letter dated January 26, 1986. Defendant IRS denied Plaintiff's request, claiming Gavette was allegedly retired prior to the date of his illness and, therefore, not qualified for the immediate and unconditional re-employment rights of an employee who recovers from a compensable illness within one year.

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[1] However, an agency may not disqualify an applicant solely because of his retired status. See Raymond v Thompson v US Postal Service, MSPB decision DA 353.99002. Further, IRS' February 20, 1986 letter acknowledges Plaintiff was retired effective February 1, 1985, subsequent to the date of his illness.

Exhibit C. On September 16, 1987, the

U.S. Department of Labor awarded a total disability compensation award for the period of January 25, 1985 through January 8, 1986. Exhibit D. On October 13, 1987, Plaintiff again requested re-employment Exhibit E.

On March 11, 1988 Plaintiff filed an Administrative EEO Complaint, Agency No. 88-1082. The complaint concerned Defendant IRS' failure to inform Plaintiff of his reinstatement rights, Defendant's refusal to reinstate Plaintiff to make a final decision and give Plaintiff his appeal rights. Exhibit F.

By letter dated March 30, 1988, responding to Plaintiff's October 13, 1987 letter, Exhibit G, IRS denied

Plaintiff's re-employment request, claiming restoration rights of 5 USC 8151 did not apply,[2] because, the IRS claimed, the compensable conditions arose after his alleged retirement. Exhibit H.

The IRS', March 30, 1988 letter was inaccurate. Plaintiff's illness commenced January 25, 1985. Plaintiff was employed by Defendant IRS at least through February 1, 1985. Exhibit I. Plaintiff was, in fact, never voluntarily retired and the Court of Appeals reversed the earlier involuntary retirement. Exhibit J. See also June I, 1988 settlement of Civil Action 84-

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[2] The IRS' reasons were much different from their initial denial of

February 20, 1986. Nevertheless, in that February 20th letter, IRS acknowledged it had placed Plaintiff on disability retirement effective February 1, 1985, after the January 25, 1985 commencement of an illness the Department of Labor found was caused by his IRS employment.

4109-DT, which restored Plaintiff to work.

On April 20, 1988 Plaintiff appealed IRS' March 30, 1988 decision letter to MSPB. Exhibit K. Plaintiff followed the appeal rights as provided by that IRS decision letter.

On May 10, 1988, Plaintiff filed a second Administrative EEO Complaint, Agency No. 88-1099. Exhibit L. This was because, as a result of a Freedom of Information Act request, Plaintiff learned IRS had failed to inform and

consider him for promotion during the first year of his absence from work during his two separate work-related illnesses, commencing in 1978 and 1985.

On May 19, 1988, Defendant IRS declined to process the first EEO Complaint, No. 88-1082. IRS contended that, since it had denied Plaintiff's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual.

On June 1, 1988, Plaintiff and Defendant settled Civil Action 84 CV-4109-DT, reversing the February 1, 1985 involuntary disability retirement and awarding Plaintiff back pay and other benefits. The settlement permitted Plaintiff Gavette to pursue

any rights he may have accrued under 5 USC 8151 and Federal Personnel Manual (FPM) 353, including employment discrimination claims. Exhibit M.

Defendant IRS, by letter dated June 14, 1988, Exhibit N, informed Plaintiff that it terminated the second EEO Complaint, No. 1099. IRS contended, as it does today, that the June 1, 1988 settlement of Civil Action 84 CV-4109-DT resolved Plaintiff's discrimination claims.3

Plaintiff then appealed the two EEO Complaints to the Equal Employment Opportunity Commission (EEOC) on June 21, 1988 and July 6, 1988. The EEOC denied each of the two Complaints on, respectively, August 30, 1988 and

September 1, 1988.

Plaintiff petitioned to EEOC for review on September 28, 1988. On March 4 and March 6, Plaintiff received by certified mail the EEOC final decisions which again supported the IRS' termination of processing those complaints. On April 3, 1989, Plaintiff timely appealed EEOC's final decisions.[4]

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[3] This is the subject of Defendant's pending Motion For Summary Judgment. Plaintiff has filed a separate answer demonstrating that Plaintiff discrimination claims are not foreclosed. It is significant that in neither of the agency denials did the EEOC suggest that the reason (or even a reason) for rejecting the claims was that Plaintiff had settled them.

[4] It is true that 29 CFR 1613.403 appears to provide a plaintiff the option to file a mixed case complaint with the agency or a mixed case appeal with MSPB, pursuant to 5 CFR 1201.151,

but not both. However, the agency is to advise the person (s)he may not initially file both and that whichever is filed first shall be considered an election to proceed in that forum. The agency did not inform Plaintiff as required. Secondly, Plaintiff has pursued his appeal rights in the two EEOC appeals and the MSPB appeal, just as had been explained to him in each decision letter. Further, case law has given Plaintiff both paths to pursue. See, e.g., McGovern v EEOC, 28 MSPB 689 (1985). Plaintiff specifically raised the promotion issue in his April 20, 1988 appeal to the MSPB and in the two EEOC cases. See also, Gavette letter of March 11, 1988 to the IRS.

For Plaintiff's illness commencing August 3, 1979, Defendant failed to comply with the requirements set forth in the Appendix. For example, Defendant failed to notify Plaintiff for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him

for immediate and unconditional employment rights or of priority re-employment rights.[5]

Regarding Plaintiff's illness commencing January 25, 1985, Defendant IRS failed to comply with all the requirements set forth in the Appendix. For example, Defendant again failed to notify Plaintiff of and to consider him for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him for immediate and unconditional employment rights, or of priority re-employment rights.

It is clear Defendant failed to comply with any and all of the requirements whatsoever at any time

during either of Plaintiff's cited illnesses. Defendants admit they have so failed, and admit a policy under which they did not do so, despite the regulatory mandate to the contrary.

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[5] Plaintiff could have been re-employed as early as May 7, 1982 after the first illness.

I. DEFENDANTS HAVE ADMITTED THEY DO NOT PROVIDE HANDICAPPED PERSONS ABSENT ON WORKERS' DISABILITY COMPENSATION WITH THE PROMOTION NOTIFICATION PROVIDED TO PERSONS WHO ARE NOT HANDICAPPED

The discovery deposition of Sharon Hays was taken March 7, 1990, as the person designated by the Defendants as the individual most knowledgeable about procedures involving persons on workers' disability compensation. In fact Ms. Hays is a personnel staffing specialist

for the IRS in special programs. These special programs include retirement, workers' disability compensation cases and priority consideration. She has the ultimate decision in determining an employee's eligibility for promotion. (Hays dep., pp. 3-4) Workers' disability compensation was Ms. Hays', program. (Hays dep., p. 65).

Hays testified that when an individual goes out on workers' disability compensation, she gives them no indication of what their rights are or of what their rights would be on returning to work. (Hays dep., p. 70). The only information she gives them relates to forms they have to submit for approval of their workers' disability

compensation (Hays dep., p. 71).

Accordingly, the IRS' policies are in violation of those rules which require that individuals out on workers' disability compensation be notified of their rights and be notified of promotional opportunities. (Appendix attached).

II. PLAINTIFF'S FAILURE TO FILE INTEREST CARDS FOR PROMOTIONS WHEN DEFENDANTS FAILED TO NOTIFY HIM OF ELIGIBILITY FOR PROMOTION OR OF THE AVAILABILITY FOR PROMOTIONS DOES NOT ABSOLVE DEFENDANTS OF LIABILITY FOR HANDICAP DISCRIMINATION.

The applicable statutory provision, 5 USC Section 8151, states in pertinent part:

"(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation

under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the

Office of Personnel Management --

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after he date of commencement of compensation ... the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion..."

The purpose of this provision is to put workers in the position they would have been in had they not been injured. Raicovich v United States Postal Service, 675 F2d 417 (1982).

In Metscpulos v United States

Postal Service, 33 MSPB 536, 539 (1987), the Board held it was the agency's burden to submit evidence regarding available positions (including competitive supervisory positions, if at issue), and any restrictive qualification requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee.[6] See also, Whitfield v United States Postal Service, 5 MSPB 239 (1981).

As for the earlier compensation award, this is covered by 5 CFR 353.307, which entitles an employee whose recovery takes longer than one year to priority consideration for restoration to the position, in view of an

application for reappointment made within 30 days after compensation ceases. The request requirement is waived, however, where the agency, as in the case at bar, fails to advise the employee "of his rights, obligations, and benefits relating to his government employment." 5 CFR 353.106).[7] Thompson v United States Postal Service, MSPB Decision DAO 353.9902 (1981).

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[6] Metsopulos was determined under Section 8151(b)(2) which is analogous to 8151(b)(1), the subject section at bar.

[7] Thus, for example, Plaintiff should have been reinstated at a higher level prior to the settlement agreement. In view of the fact that the IRS chose to give Plaintiff a lump sum award, taxable at the higher rate, in conjunction with the settlement agreement, had Plaintiff been reinstated

on a timely basis, he would not have lost half his salary to taxes. Of course, this is in addition to the harm Plaintiff suffered when he was denied reinstatement after his first period of compensable illness.

At the very least, Plaintiff can establish by non-speculative evidence that he would have been promoted, Boese v Department of the Air Force, 784 F2d 388, 390 (Fed. Cir. 1986), a requirement which the Boese case found that Plaintiff did not sustain, although that Judgment was made following a trial before the MSPB. Evidence that the individual is able to perform the duties of the higher-grade positions for which he seeks retroactive promotion is significant. Naekel v Department of Transportation, FAA, 850 F2d 682, 684 (Fed. Cir. 1988).

Although Naekel suggests that now Plaintiff may have to demonstrate he would have obtained the position, the application of Metsopulos and Whitfield, as well as Section 8151(b)(1), demonstrates that where the agency fails in its burden to provide Plaintiff with relevant information to permit him to proceed with promotion(s), Defendants have rendered it impossible for Plaintiff to seek that particular burden. "Each promotion made under this section is to be effected on the day it would be effected if the employee were present." FPM Subchapter 2-3-2(b).

Plaintiff never applied for promotion because Defendants failed to tell him he could apply, and did not

tell him the positions he could apply for. By violating the rules which require Defendants to advise Plaintiff of his rights, the Defendants themselves created the situation which prevented Plaintiff from obtaining the promotions, promotions for which Defendants themselves have acknowledged he is eligible.[8]

III. DEFENDANTS SAVE DISCRIMINATED AGAINST PLAINTIFF BECAUSE OF HIS HANDICAP AND ARE, LIABLE WITHOUT PROVING DISPARATE TREATMENT.

Defendants have argued in this lawsuit that the only discrimination which is actionable is that alleging disparate treatment. Clearly, this is not the law. If an individual is treated in a specific manner for reason

of that person's handicap, Schipani v Ford Motor Co, 102 Mich App 606; 302 NW2d 307 (1981), then that is handicap discrimination. Section 504 of the Rehabilitation Act of 1973, 29 USC, Section 791, prohibits discrimination "solely by reason of the handicap" of "otherwise qualified individuals". Such discrimination is actionable if the individual is classified in a certain way because of a handicap, or if individuals who are handicapped are all treated the same way. Rancour v Detroit Edison Co, 150 Mich App 276, 289; 388 NW2d 336 (1986).

In the case at bar, Defendants have admitted that their policy is not to communicate information concerning

promotions to individuals absent on workers' disability compensation. Since

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[8] It is clear that Plaintiff was qualified for at least Grade 13 positions. In 1971, 90.8% of his work was at Grade 13 or above. In 1979, he was on a qualified for GS-13 promotion roster. In October, 1989 he was declared eligible for a GS-13 promotion Exhibit 0. See also, Exhibit P.

by definition, those who are on workers' disability compensation are handicapped, see, e.g., Rancour, supra, at 290,[9] it is axiomatic that persons who are absent on workers' disability compensation are treated differently from others because of their handicap.[10]

It makes no difference that Plaintiff was not adjudicated absent on workers' disability compensation

immediately, for the reason that the policy of non-notification remained the same and has never been changed. Additionally, the workers' disability compensation award was made retroactive and, thus, effective as of the date of Gavette's initial absence. Further, if the Defendants specifically had determined not to send Plaintiff the notices because it had not yet been adjudicated whether he was on workers' disability compensation, Defendants took that risk. They now should not benefit from the risk that they lost. Defendants have further bootstrapped the fact that Plaintiff did not apply for any positions, because he didn't know that they were available, into a method of

avoiding compliance with the Merit System Protection decision. The Board's decision, as sent to this Court, was that Plaintiff should be treated as if

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[9] An individual with handicaps is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 USC Section 706(8)(b).

[10] Indeed, the government may not favor one class of handicapped person over another. Aden v Health and Human Services, 780 F2d 64; 39 FEP Cases 1108 (D.C. 1985).

he had been employed. Defendants have construed that "as if he had been employed" to mean that he could get a promotion only if he had applied for one. However, what Defendants have failed to note is that they never told him about employment opportunities

because he had not been treated as if he was employed. There is, thus, a substantial reason for this court to continue to retain jurisdiction of this case, and to find that this particular policy is discriminatory and that it violates Plaintiff's right not to be discriminated against because of his handicap.

Further, Defendants argue that the particular regulation at issue in the case at bar was never construed as Plaintiff now argues. First of all, Defendants' argument begs the question. The regulation was changed to reflect the interpretation Defendants now argue. Had it been given that interpretation to begin with, there would have been no

reason to change it. Clearly, it was changed from that which Plaintiff contends it was. During the relevant period the old regulation controlled.

Secondly, and most importantly, there has been an adjudication that the regulation means precisely what the Plaintiff argues it means, and that was the decision of the Merit System Protection Board in the case at bar.

In Harrison v Marsh, 46 FEP Cases 971 (W.D. Mo, 1988), Plaintiff had a radical mastectomy which prevented her from performing continuous typing. The Court, noting that the official general policy of the United States is that "[t]he Federal Government shall become a model employee of the handicapped

individuals", 29 CFR Section 1613.703, held that a governmental agency had a high burden to meet when confronted with the need to accommodate a handicapped employee. 46 FEP Cases at 976. The Defendant Army's failure to adequately notify Plaintiff of her rights with regard to interviewing for a new position were held to have violated the Act. 46 PEP Cases at 977.

Indeed, in appropriate cases, a court can order a promotion as relief for a violation of discrimination. Locke v Kansas City Power & Light Co,[11] 600 F2d 359; 26 FEP Cases 1549 (8th Cir. 1981), reflecting that there is absolutely no justification for preventing handicapped persons from

being promoted.[12]

Defendants' sophistic arguments concerning their immunity from liability because Gavette did not file an interest card is analogous to the argument rejected in Bryne v Golden, 48 FEP

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[11] This was the relief ordered in Harrison v Marsh, supra. See also, Cook v United States, 36 FEP Cases 1260 (Colo, 1983) where a requirement that Plaintiff present a certificate that he was mentally restored to be eligible for an informal referral system was found discriminatory, in that it required him to no longer be handicapped to use the system. The remedy was to give him priority for a 700-hour trial appointment at the GS-7 level, without adversely affecting his present GS-4 grade.

[12] The employee must be qualified, which Defendants recognized in the case of Gavette by placing him on the position-eligible list.

Cases 313 (S.D. N.Y. 1988), where the

General Services Administration (GSA) claimed that Plaintiff could not bring a handicap discrimination case because he failed to exhaust administrative remedies in time. Plaintiff claimed the failure was caused by the government's misleading him. The court, rejecting Defendants' claim that Plaintiff cannot invoke estoppel against the government, relied on decisions from the Third, Fourth, Fifth, Ninth, Tenth, Eleventh and D.C. Courts,[13] to hold that Plaintiff's position prevailed. Thus, since in the case at bar Plaintiff did not file interest cards because Defendants never gave him the opportunity to do so, Defendants are now estopped from raising this defense,

caused by their own violation of law.

CONCLUSION

Accordingly, summary judgment on behalf of the Plaintiff on the issue of discrimination because of handicap is requested.

Respectfully submitted,

ROY SHECTER & VOCHT, P.C.

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(313) 540-7660

Dated: September 26, 1990

[13] Only the 7th Circuit Court decided contra.

APPENDIX

The Federal Personnel Manual provisions in effect during the required time period provide:

"Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved."

FPM Subchapter 3-1

"When employees sustain a compensable injury .... the agency must tell them .... about .... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave must know exactly when to report for work after recovering from injury .... On things employees must decide for themselves, they should have all the information necessary to make a good decision, for decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to

remain to their credit until returning, and the right to leave their retirement deductions or to take a refund.

FPM Appendix A-1(e)

"If any employee has recovered within one year after the date of compensation begins ... the employee is entitled to resume his or her former or an equivalent position."

FPM Subchapter 2-6(A(1)

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee fully recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination.

FPM Subchapter 2-6(a)(4)

"If an employee's recovery takes longer than one year from the date compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his or her former or an equivalent position ...."

FPM Subchapter 2-6(a)(3)

"Restoration right is agency wide. The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency."

FPM Subchapter 4-2(b)

"An agency must consider absent employees for every promotion they would be considered for if they were present.[1]

FPM Subchapter 3-2(a)

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present."

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[1]/This did not happen. The agency did not notify Plaintiff of promotional opportunities. If he did not know, he couldn't apply. Having thus deprived him of the opportunity to apply, Defendants take the position that they are absolved of liability because Plaintiff never applied. Exhibit A, Defendants' Answers to Interrogatories. Additionally, had Plaintiff rightfully and timely been reemployed he would not

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have lost the opportunity to advance in his career.

FPM Subchapter 3-2(b)

The applicable statutory provision 5 USC A Section 8151, states in pertinent part:

"(a) in the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service."

"(b) Under regulations issued by the Civil Service Commission.

> (11) The department or agency which was employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation the right to resume his former or an equivalent position as well as all other attendant rights which the

employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion ...." (emphasis added)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 7: I am appealing the following:

1. The March 30, 1988 Internal Revenue Service letter of decision denying me restoration rights for reemployment which I claim to be entitled to pursuant to 5 U. S. C. 8151(b)(1). See exhibit -A- March 30, 1988 IRS decision letter.

2. IRS failure to notify me of restoration/reemployment rights for an employee who is absent from duty because of a workers compensation claim, for the following workers' compensation claims I filed:

   a) Workers' compensation claim and award for the period August 3, 1979 through 7, 1982.
   b) Workers' compensation claim and award for the period January 25, 1985 through January 8, 1986.

3. IRS failure to notify me of promotional rights for an employee who is absent from duty because of

a workers' compensation claim, for each claim as stated in 2 above.

4. IRS failure to notify and inform me of the following as stated in Federal Personnel Chapter 353-A-1(e):

"Employees going on leave of absence must know exactly when to report for work after ... recovering ... On things employees must decide for themselves, they should have all the information necessary to make a good decision; for example, decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until their return, and the right to leave their retirement deductions or to take a refund.

"All of the above are covered 5 U. S. C. 8151 and FPW Chapter 353 Item 10A and 10B Grade and salary at time of action:

My grade and step on August 3, 1979 was grade 12, step 7. My salary on August 3, 1979 was 27,707.

My grade and step on January 25, 1985 was grade 12 step 9. My salary on January 25, 1985 was 40,051.

Items 15 and 16: Length of service with acting agency and Government.

IRS service, June 19, 1961 through January 31, 1985. Also imminent settlement of a discrimination law suit provides for my reinstatement retroactively to February 1, 1985 with back and return to duty.

U.S. military service, October 21, 1952 to September 1, 1956.

U.S. Postal Service, Christmas temporary help 1957, 1950 and 1959.

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 21: Why do you think the agency was wrong in taking the action:

1. In regard to my workers' compensation claim and award for the period August 3, 1979 through 7, 1982:

   a) IRS has never given me a reason for not providing me with my rights as an employee who has filed a workers' compensation claim. The fact IRS has failed to comply with the requirement of an agency as provided for in FPM Chapter 353 is prima facie evidence IRS is wrong.

2. In regard to my workers' compensation claim and award for the period January 25, 1985 through January 8, 1986:

   a) IRS has never given me a reason for not providing me with my rights as an employee who has filed a workers' compensation claim. The fact IRS has failed to comply with the requirements of an agency as provided for in FPM Chapter 353 is prima Facie evidence

IRS is wrong.

b) By letter dated January 27, 1986 I notified IRS of my recovery from an illness and requested to be returned to duty immediately. I also requested - IRS timely advise me and/or counsel me of any and all reemployment rights I might possibly be entitled to and all Federal laws regulations. Nearly one month late IRS sent me a letter dated February 20, 1986 which states:

"As you have been previously advised, it is our position that as of February I, 1985, you are retired on disability

Clearly the IRS February 20, 1986 reply to January 27, 1986 request be immediately returned to duty did not consider my rights pursuant to 5 U.S.C. 8151 and FPM 353. Rather, it is clear IRS assumed since I was retired I had no right, pursuant to 5 U.S.C. 8151 and FPM 353.

In March 1988 I discovered through a Freedom of Information Act request that I had immediate restoration/employment rights as of January 9, 1986. That was pursuant to 5 U.S.C. 8151 and FPM 353,

since I had recovered from the illness within one year and IRS did not controvert my workers' compensation claim. FPM Chapter 353 Subchapter 2-6(4) states:

"note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example if the employee fully recovers, but the apartment of labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination. Agencies may make an exception to the policy if they are controverting an employee's claim.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

IRS letter of February 20, 1986 states:

> "... an agency may hire a disabled annuitant, prior to a finding by OPM that the individual is recovered. Such reemployment, however, is solely at the agency's election.

It is apparent IRS considered me retired effective February 1, 1985 and - therefore I did not have immediate and unconditional rights for restoration/reemployment following my recovery from an illness for which IRS had not controvered workers' compensation claim. Raymond O. Thompson v U.S. Postal Service, MSPB decision DAO 35399002 in considering an employee's reemployment rights pursuant to 5 U. S.C. 8151 and FPM Chapter 353 states:

> "An agency may not disqualify an applicant solely because of his retired statue."

For all of the above reasons IRS February 20, 1986 response to my letter of January 27, 1986 was wrong. See

Exhibit - B -, January 27, 1986 letter by Charles E. Gavette to IRS. See Exhibit - C - , January 20, 1986 letter by IRS to Charles E. Gavette.

c) By decision letter dated September 16, 1987 awarded a worker's compensation award for the period June 25, 1985 through; January 8, 1986. I assumed now that I had received a compensation award my rights for immediate and unconditional return to work were then effective and I should be notified by IRS to return to work. I did not hear from IRS so by letter dated October 13, 1987, hand delivered, I requested immediate and unconditional restoration/reemployment rights pursuant to 5 U.S.C. 8151. Over 5 months later IRS finally gave me a letter of decision dated March 30, 1988. IRS explained their procrastinacision and delay in reaching a decision was because extensive research and fact finding was necessary. FPM Chapter 353 appendix A-4(4) requires when an agency fails to restore an employee immediately the agency must immediately notify the employee in writing of the reasons and inform the employee of appeal rights. Obviously IRS failed to comply with that FPM provision initially and

continuously since January 1986 through March 30, 1988.

The IRS decision letter of March 30, 1988 provides weak and fabricated reasons for denying me rights claimed pursuant to 5 U.S.C. 8151 and FPM Chapter 353. IRS position that my illness commencing January 25, 1985 was long after my separation is wrong because the Court reversed my January 6, 1982 involuntary disability retirement. The Court further ordered I be paid back pay and other benefits. The other benefits awarded me by the Court include my right as an employee to file a workers' compensation claim and my rights claimed pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

Charles E.Gavette
SS# 374-32-5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

IRS letter February 20 1986 acknowledges I was an employee through January 31, 1985. That letter states:

> "As you have been previously advised, it is our position that as of February 1, 1985, you are retired on disability."

IRS position that my illness incurred on January 25 1985 was not precipitated or aggravated by the IRS erroneous allegations my performance was deficient is both ludicrous and a moot issue. Whatever the cause of an employee's compensable injury or illness is all that is essential for immediate and unconditional restatement/reemployment rights pursuant to 5 U.S.C. 8151 and FPM Chapter 353, in event there has been full recovery within one year. As stated above in event an agency does not controvert a workers' compensation claim the immediate and unconditional rights for restoration are effective immediately at the date of full recovery, even though that may be prior to the final decision of the workers compensation claim.

For all of the above reasons IRS March 30, 1988 response to my October 13, 1987 letter is wrong. See Exhibit - D - October 13, 1987 letter by Charles E. Gavette to IRS.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 22: What action would you like the Board to take on this case?

I am asking the board to take the following action:

1. Determine IRS engaged in wrongful and prohibited personnel practices including discrimination as result of the following:

   a) IRS failure to comply with the requirements of an agency as provided for pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

   b) IRS refusal to inform and discuss with me the IRS understanding of the facts and law prior to issuance of the March 30, 1988 decision letter denying me restoration rights, pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

2. Reinstate me, pursuant to authority of 5 U.S.C. 8151(b)(1), and FPM Chapter 353, effective February 1, 1985 with retroactive back pay and

other benefits, as authorized by the back pay act.

3. Award me retroactive promotions to grades 13, 14, and 15 at earliest dates legally possible, with back pay retroactive, as result of failure to notify me of promotional rights and opportunities during my absences from duty for periods August 3, 1979 through May 7, 1982 and January 25, 1985 through January 8, 1986, because of my workers' compensation claims for which I received compensation awards because of illnesses caused by IRS wrongful and discriminatory actions.

4. Award me any retroactive promotions, at earliest dates legally possible, not awarded under request per 3 above and any additional promotions legally permissible because of wrongfully and discriminately both failing to notify me of my right to return to work following my recovery of compensable illnesses and because of IRS refusal to permit me to return to work following my recovery from compensable illnesses.

5. Order IRS to comply with FPM Chapter 353-A-1(e). See attachment

page A-I, item 7, number 4.

6. Order IRS to accommodate my handicap by ordering IRS not to assign me to work under the supervision of Mr. Anthony Wycihowski.

7. Order IRS to provide any other remedies appropriate including training back pay with interest, and expenses/cost or attorney fees and other cost.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 23: If you believe you were discriminated against by the agency in connection with the matter appealed because of either your ... handicapping condition or age indicate so and explain why you believe it to be true. You must indicate by examples how you were discriminated against.

I was discriminated against based on my handicap and age as follows:

1. IRS completely failed to comply with the requirements of "telling employee of rights" as is required of an agency when an employee files a workers' compensation claim and is absent from duty. See FPM Chapter 353A-1(e).

2. Prior to IRS decision letter of March 30, 1988 IRS at no time discussed with me the facts as they contend them to be. IRS also did not discuss their interpretation of the law. Stated refusal by IRS discriminatorly denied me administrative due process to attempt to resolve the issues at the agency level based on

meaningful exchange and discussion of the facts and law. It is with those discriminatory circumstances I am forced to either yield to IRS intimidation and retaliation or to make this appeal. See - E - my April 6, 1988 response to IRS March 30, 1988 decision letter.

3. The reasons in IRS decision letter of March 30, 1988 are conclusory without any supportive evidence of facts or law whatsoever.

4. I contend IRS has intentionally refused to comply with FPM Chapter 353 A-4-4 in an effort to force a more favorable settlement of a discrimination law suit in U.S. District Court in which I am plaintiff and IRS is defendant. For same reason IRS has denied me administrative due process as stated in 2 above.

5. IRS decision and failure to comply with proper notification to me is also based on discrimination and retaliation because of my filing two grievances in 1979, my successfully obtaining Court reversal of the January 6, 1982 involuntary disability retirement. Similarly because of my successful law suit obtaining an award for attorney fees and cost.

DEPARTMENT OF THE
INDIVIDUAL COMPLAINT OF EMPLOYMENT
DISCRIMINATION

Based on
Race, Color, Religion, Sex, National
Origin, Age, Physical or Mental Handicap
or Retaliation

FOR OFFICE USE ONLY
PLEASE TYPE OR PRINT
COMPLAINT NO.

PLEASE NOTE: INFORMAL PRE-COMPLAINT EEO COUNSELING IS A REQUIREMENT AND NO FORMAL COMPLAINT CAN BE ACCEPTED FOR INVESTIGATION WITHOUT IT.

---

1. Charles E. Gavette
6816 Blue Grass
Clarkton, Mich. 48016

Home Phone: Area Code 313 625-2854

Give area code and number where you can be reached during normal business hours if different from those above.

---

3. Are you working for the Federal

Government? Yes __ No X See comment reverse of this form

What was the date of the last alleged The Discriminatory/retaliatory event is ongoing

7. What was the date of your last interview wit the EEO? I last spoke with EEC Counselor M. DellaMara, by phone 5/3/88 Address: 229 Fed. Bldg. , Lansing MI 48992. 517-377-1810

Check only the basis or bases on which you think you were discriminated against. Put information in the space provided only for the category or categories in which you are alleging discrimination. If alleging age discrimination, give date of birth. (To file a complaint based on age, you must have been at least 40 years old when the matter of concern occurred.) If alleging handicap discrimination, you must offer evidence of your specific impairment and whether and how you are qualified for the position, training, etc. sought.

X AGE
__ SEX _____ __ COLOR: _____

DATE OF BIRTH 9-17-32

__ SEX HARASSMENT _____

HANDICAP:

X MENTAL
__ RELIGION _____ __ RACE _____

__ RETALIATION/REPRISAL

FOR INVOLVEMENT IN

COMPLAINTS PROCESSED

PHYSICAL
mental and physical handicaps are the result of IRS's record of having erroneously perceived me to be handicapped, based on psychiatric reasons. The harassment and stress caused me by IRS resulted in emotional illness and physical illness high blood pressure (hypertension), etc.
qualify for the position sought because the Labor Dept. determined
I fully covered within one year. See 5 USC 8151(b)(1) and FPM 353 provisions. February 1, 1985 United States Court of Appeals For The Federal District Court.

10. State your complaint. Use extra sheets if necessary. Identify the specific acts, incidents or events which you believe were discriminatory or in retaliation against you. Show the dates on which these acts, incidents or events

occurred. If you are alleging discrimination against, e.g. failure to modify work site, failure to offer opportunity for training or advancement. If you are handicapped and your complaint is concerned with specific job, training, etc. you should offer evidence that you were qualified for the position, training, etc. which you sought. If handicapped, you should also request the reasonable accommodation you prefer appropriate.

See attachment pages A-1 and A-2 for item 10.

SPECIAL COMMENT REGARDING EARLIER COMPLAINT OF MARCH 11, 198:

This complaint is an expansion of an earlier formal complaint filed March 11, 1988. The cause for this complaint results from information received under the Freedom of Information Act subsequent to the EEO counselors meeting with me. The information received brought to my attention a much larger scope of discrimination against me by my employing agency, IRS.

Accordingly Equal Employment Opportunity Commission or others concerned may want to associate this complaint with the March 11, 1988 complaint. Decision to file this complaint was the result of the following:

1. My letter dated March 11, 1988 to Dorthy Drake EEO Coordinator IRS, Detroit, Mich. P.O. Box 33050, Stop 47. See Exhibit "A".

2. Dorthy Drakes March 31, 1988 response to my March 11, 1988 letter, See exhibit "B".

Item 8:
On April 20, 1988 I appealed the IRS's March 30, 1988 decision not to reinstate me pursuant to 5 USC 8151 and FPM Chapter 353. That refusal now in the initial stage was filed with Merit

Systems Protection Board, Federal Building, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604.

Item 9: Settlement of discrimination law suit seems imminent. Settlement will include my being reinstated as an employee of IRS effective retroactive to February 1, 1985, with back pay and other benefits WSPB Docket Number CHO3538810382

11. State the remedial or corrective action you are seeking to resolve your complaint.

See attachment page A-3

12. You must sign and date this complaint.

ATTACHMENT TO:
INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Statement of complaint, acts, incidents, events of which IRS discriminated and retaliated against me:

1. IRS failure to notify me of restoration/reemployment rights for an employee who is absent from duty because of a workers' compensation claim, for the following workers' compensation claims I filed:

2. a) Workers' compensation claim and award for the period August 3, 1979 through May 7, 1982.

b) Workers' compensation claim and award for the period January 25, 1985 through January 8, 1986.

2. IRS failure to notify me of promotional rights for an employee who is absent from duty because of a workers' compensation claim, for each claim as stated in 2 above.

3. IRS failure to notify and inform me of the following as stated in Federal Personnel Manual Chapter 353-A-1(e):

"Employees going on leave of absence must know exactly when to report for work after ... recovering ... On things employees must decide for themselves, they should have all the information necessary to make a good decision: for example, decisions on what to do about rights under the life insurance and health benefit programs right to be paid for annual leave or to permit it to remain to their credit until their return, and the right to leave their retirement deductions or to take a refund.

4. IRS failed to comply with the requirements of FPW 353 Appendix A 4-4 because:

   a) IRS decision not to grant me reinstatement/restoration rights was excessively delayed in an effort to influence settlement negotiations of a discrimination law suit I have against IRS.

   b) IRS written notification denying me reinstatement/resoration rights does not provide adequate reason of facts or law.

5. IRS denies me adminisstrative due process at the agency level by refusing to discuss any fact or law, as they contend them to be.

6. IRS decision not to reinstate me and failure to comply with proper notification to me is also based on discrimination and retaliation because of my filing two grievances in 1979, my success fully obtaining Court reversal of the January 6, 1982 involuntary disability retirement. Similarly because of my successful law suit obtaining an award for attorney fees and cost. Same is true because of a discrimination law suit in U.S. District Court in which I am plaint and IRS is defendant.

ATTACHMENT TO:

INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Statement of manner in which I contend I have been discriminated against as resuslt of IRS perception I am handicapped:

IRS has a record of erroneously perceiving me as having a mental handicap. IRS action erroneously caused OPM to grant IRS application for my involuntary disability retirement, alledgedly based on physhiatric illness or handicap. That involuntary disability retirement was reversed by U.S. Appeals Court for the Federal District, in a February 1, 1985 decision.

The above state action and harassment resulted in my being awarded two workers' compensation claims for emotional illness.

IRS rather than accommodate my perceived handicap, by way of transferring me away from a discriminating supervisor, pursued efforts to place me on involuntary disability retirement. IRS now refused to comply with my rights

pursuant to 4 USC 8151(b)(1); immediate and unconditional restoration to duty following my recovery from a compensable illness within one year.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

vs.

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

STIPULATION FOR COMPROMISE SETTLEMENT

IT IS HEREBY STIPULATED between Plaintiff CHARLES E. GAVETTE, (Hereinafter "MR. GAVETTE") and Defendant SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY (Hereinafter

"SECRETARY") as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action upon the terms indicated below.

2. The SECRETARY will cancel or cause to be canceled the disability retirement which was effective February 1, 1985 and will reinstate MR. GAVETTE as a grade 12 Revenue Agent in Pontiac, Michigan, as if he had remained on active duty. The appropriate within grade increase to Step 10 of that position will be credited effective on or about January 31, 1988. MR. GAVETTE will be paid back pay from February 1, 1985 to the effective date he is permitted to return to work, subtracting disability retirement pay, worker's

compensation benefits, and any earnings received from other employment in the interval, as well as all other appropriate deductions from pay and other computations, pursuant to 5 C.F.R. part 550, Subpart H-Back Pay. Sick leave will be credited as appropriate to MR. GAVETTE'S account for the period February 1, 1985 to the date MR. GAVETTE is permitted to return to duty, pursuant to 5 C.F.R. Part 550, Subpart H-Back Pay. Annual leave for the period February 1, 1985 to the date MR. GAVETTE is permitted to return to duty will be credited an appropriate to MR. GAVETTE'S account together with the annual leave for which MR. GAVETTE received a lump-sum payment after the Federal Circuit

decision on February 1, 1985 in Gavette v. Office of Personnel Management, Department of Treasury, (Fed Cir. Appeal No. 84-1286). One of the deductions from MR. GAVETTE'S back pay is the lump-sum (leave) payment in return for recrediting of MR. GAVETTE's annual leave account pursuant to 5 C.F.R. Part 550, Subpart H - Back Pay. The Internal Revenue Service (hereinafter "IRS") agrees to permit MR. GAVETTE the option to buy back any leave permitted by law, including leave used in lieu of workers' compensation benefits.

3. It is agreed that Pontiac, Michigan will be MR. GAVETTE'S assigned post of duty. It is understood, however, that MR. GAVETTE will receive

the same classroom and other training as is given to individuals new to the position of Revenue Agent. Such retraining for him may be held at his assigned post of duty (Pontiac), at Detroit IRS offices or at other offices of IRS. Throughout the retraining phases, MR. GAVETTE will be given work assignments commensurate with the amount of retraining he has received taking into consideration his lengthy absence but also his past experience. On the one hand, cases assigned to MR. GAVETTE should not be beyond his perceived present capabilities with more complex cases assigned only after any necessary retraining has been provided. On the other hand, he should be expected to

perform at a level for which his prior experience and training have prepared him with more flexibility as to the order of retraining classes and the amount of non-classroom retraining needed. It is expected that he will be able to handle complex cases much more quickly than a new Revenue Agent. However, IRS also recognized that MR. GAVETTE will need to receive retraining before he is expected to perform work commensurate with his grade level. It is understood that IRS has the right and duty to supervise MR. GAVETTE'S work and retaining with broad discretion according to IRS needs and MR. GAVETTE'S performance. It is further understood that MR. GAVETTE shall be reimbursed in

accordance with the established rules and regulations for all appropriate travel expenses incurred in connection with any (re)training courses conducted at places other than his assigned place of duty, Pontiac, Michigan.

4. MR. GAVETTE agrees to accept such cancellation of disability retirement, reinstatement, back pay, leave restoration rights, plus leave buy back rights permitted by law, retraining, and provision of paragraphs 5 and 7 herein in full settlement of any and all claims and demands which he or his heirs, executors, and administrators or assigns may have against the SECRETARY, IRS, the Office of Personnel Management, the Merit Systems Protection

Board and the United States of America, or their agents or employees on account of the incidents or circumstances giving rise to this suit except as hereinafter provided in paragraph 8.

5. The SECRETARY states that the group to which MR. GAVETTE is assigned in Pontiac, Michigan is not under the supervision of Mr. Anthony Wycihowski. It is the intent of IRS, to the extent practicable, not to place MR. GAVETTE under the immediate supervision of Mr. Wycihowski. Based on unforeseen circumstances, if Mr. GAVETTE should ever be placed under the immediate supervision of Mr. Wycihowski or assigned to a branch of which Mr. Wycihowski is the branch chief, MR.

GAVETTE will be given all due consideration should he request reassignment at that time.

6. In exchange for the promise herein of the SECRETARY to grant MR. GAVETTE's cancellation of the disability retirement, reinstatement, back pay, leave restoration rights, plus leave buy back rights permitted by law, retraining and all other provisions set forth herein, MR. GAVETTE shall stipulate to dismissal of the above-entitled action with prejudice, each party to bear it own costs, expenses, and attorney fees.

7. Upon reinstatement, MR. GAVETTE shall be permitted to request or apply for positions in other posts of duty as any other IRS employee.

8. This Agreement shall not constitute an admission of liability or fault on part of the SECRETARY, IRS, the Office of Personnel Management, the Merit Systems Protection Board and the United States of america or their agents or employees. The SECRETARY understands that MR. GAVETTE reserves any and all rights which may accrue or have accrued to him as a federal employee under the United States Department of Labor, Employment Standards Administration, Office of Worker's Compensation Progress (OWCP) as well as pursuant to 4 U.S.C. 8151 and Federal Personnel Manual Chapter 353, including any right of Equal Employment Discrimination Complaints with respect to alleged IRS

violation of any and all rights pursuant to 5 U.S.V. 8151 and Federal Personnel Manual Chapter 353.

ROY C. HAYES
United States Attorney

FRANCIS L. ZEBOT (P22700)
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226
(313) 237-4779

CHARLES E. GAVETTE
Plaintiff
6816 Blue Grass
Clarkston, Michigan 48016
(313) 625-2854

Personnel Branch
STOP 5

QUALIFICATION NOTIFICATION FOR
ANNOUNCEMENT

IRS

YOU ARE ELIGIBLE AT GRADE: 13 POD: PO

If you have any questions, please
contact your manager.

Gavette, Charles
E:5:1504

STOP 939

ATTACHMENT TO:
INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Item 11:
State the remedial or corrective action you are seeking to resolve your complaint:

1. A determination IRS engaged in wrongful and prohibited personnel practices including discrimination as result of the following:

   a) IRS failure to comply with the requirements of an agency as provided for pursuant to 5 USC 8151 and FPM Chapter 353.

   b) IRS refusal to inform and discuss with me the IRS understanding of the facts and law prior to issuance of the March 30, 1988 decision letter denying me restoration rights, pursuant to 5 USC 8151 and FPM Chapter 353.

2. Reinstate me, pursuant to authority of 5 USC 8151(b)(1) and FPM Chapter 353, effective February 1, 1985 with retroactive back pay and other benefits as authorized by the back pay act.

3. Award me retroactive promotions to grades 13, 14, and 15 at earliest dates legally possible, with back pay retroactive, as result of IRS failure to notify me of promotional rights and opportunities during my absences from duty for periods August 3, 1979 through May 7, 1982 and January 25, 1985 through January 8, 1986, because of my workers' compensation claims for which I received compensation awards because of illnesses caused by IRS wrongful and discriminatory actions.

4. Award me any retroactive promotions, at earliest dates legally possible, not awarded under my request per 3 above and any additional promotions, beyond grade 15, legally permissible because of IRS wrongfully and discriminately both failing to notify me of my right to return to work following my recovery of compensable illnesses and because of IRS refusal to permit me to return to work following my recovery from compensable illnesses.

5. Order IRS to comply with FPM 353 -A-1(e). See attachment page A-I, item 7, number 4.

6. Order IRS to accommodate my handicap by ordering IRS not assign me to work under the supervision of Dr. Anthony Wycihowski.

7. Order IRS to provide any other remedies appropriate including training, back pay with interest, other benefits, attorney fees and cost.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

AFFIDAVIT OF CHARLES GAVETTE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

CHARLES GAVETTE, being duly sworn, deposes and says:

1. I make these statements of my own personal knowledge, and if sworn as

a witness, I am competent to testify to the truth herein.

2. During any periods in which I was off on a workers' compensation related condition, I was never notified by Defendants of my eligibility for promotion or of any availabilities for promotion.

3. I had previously filed interest cards when I learned of promotion opportunities, and I would have continued to do so.

4. My only reason for not filing interest cards while I was off on workers' compensation was the Defendants' failure to notify me of right to promotion and to positions which became available.

FURTHER DEPONENT SAYS NOT.

_____

CHARLES E. GAVETTE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

PLAINTIFF'S ANSWER TO DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully refers this Honorable Court to the Statement of Facts in Plaintiff's Motion For Summary Judgment and in Plaintiff's Answers to Defendant's Motion For Summary Judgment.

Defendant's last salvo in its paper war avoids the obvious.

This Honorable Court has jurisdiction of the case at bar under three approaches:

(a) as a discrimination action;

(b) as a mixed case, pursuant to Williams v. Dept. of the Army; 715 F2d 1485 (Fed Cir. 1983);

(c) as a discrimination action because no adverse action was taken.

In a mixed case, an employee may file his discrimination action with the Federal District Court under 5 USC Sec. 7702 (e) (1), if the Merit System Protection Board (MSPB) takes more than 120 days to decide an appeal. This

happened in the case at bar.[1] Cases involving discrimination claims may also be filed directly to the United States District Court within 30 days of final agency action, which is what GAVETTE did at bar. Pursuant to Senate Report No. 969, 95th Cong. 2d Sess., reprinted in (1978) U.S. Code Cong. & Ad. News 2775,2785, this was because:

"District Court is a more appropriate place than the Court of Appeals for these cases, since they may involve additional fact-finding. Furthermore, discrimination complaints involving employees outside the

---

[1]Althcugh Gavette filed this action within the 30 day period following the adverse action by the agency and after exhausting his administrative remedies, it appears that he would have been properly before this court on the basis of the excess of 120 days having run as well.

Federal government are now considered by U.S. District Courts. To encourage uniform judicial decisions in this area, both kinds of cases should continue to be considered by the U.S. District Court. The Section, therefore, exempts from the general requirement that employees appeal to the Court of Appeals or Court of Claims, those suits brought pursuant to the anti-discrimination laws."

In Williams v Dept. of the Army, 715 F2d 1485,36 FEP Cases 1518 (Fed. Cir. 1983), the Federal Circuit determined that bifurcation of an appeal from an MSPB decision in a mixed case was not permitted, and, rejecting dual review, held that appropriate jurisdiction was in the District Court pursuant to the statutory scheme. The court transferred the appeal to the District Court. 36 FEP Cases at 1522.

Defendants do not contend that the

discrimination portion of this lawsuit is properly before this court, GAVETTE filed with the EEOC, and, following cancellation of the discrimination claim, filed in this court. This is an action de novo, e.g. Rosenfeld v Dept. of Army, 769 F2d 237 38FEP cases 1150 (4th Circuit, 1985). This is appropriate, whether the final agency action consists of resolution of the mixed case by the Board or rejection of the claim by the agency. See S.Rep. No 969, 95th Cong., 2d Sess. 63 reprinted in 1978, U.S. Code Cong. & Ad. News 2723,2785. As an employee always has the right to de novo judicial review of discrimination in a District Court, Moore v. Devine, 780 F2d 1559 (11th

Circuit, 1986), GAVETTE is properly before this court. Most significantly, an appeal was not taken from the MSPB because it appears that the case does not satisfy the statutory scheme. The Defendants' petition before the this court establishes that there was no adverse action taken against GAVETTE, but that their actions were taken pursuant to a discriminatory policy. Thus, there was nothing to appeal, and GAVETTE is properly before this court because the application of a discriminatory policy deprived him of promotion.

That is because GAVETTE claims the failure to promote or to reinstate in a timely manner derived form a

discriminatory policy which Defendants do not deny. See, Plaintiff's Motion For Summary Judgment. As such, this is not an adverse action as construed under USo 7701. The case at baar, as developed by discovery, and admitted by

---

[2]The Defendants admit that they do not send out notices of reinstatement rights or of available promotions to persons as a class who are handicapped and on Workers Disability Compensation. If this Honorable Court determines that this is a discriminatory policy, then Gavette will be entitled to remedies, including promotion positions for which he would have been eligible had he received those notification rights. Defendants have contended that because Gavette never filled out the interest card, which an employee fills out when notified of the available positions, that they, therefore, were justified in the failure to promote him. Thus, Defendants have presented a defense which is a classic Catch-22, i.e., since we didn't notify you of the positions,

you didn't fill out the interest cards, and, therefore, if you didn't fill out the interest cards, we didn't have to promote you.

and admitted by Defendants, does not constitute an adverse action. Indeed, the agency claims that it has met the requirement of providing Plaintiff with consideration for promotion equivalent to that given employees who are not compensably absent from work. Thus, as there was no adverse action, there was nothing to appeal to the MSPB. The Defendants have used the failure to give notice as the basis for justifying the denial of the right for promotion. Their own actions thus demonstrate the need to require notice. This notice requirement is a part of the case at bar

before this Honorable Court. It is part and parcel of the claim for discrimination.

That part of the Defendant's Supplemental Motion directed to dismissal of the Age and Handicap Discrimination claims, misconstrues the case at bar. Plaintiff is contesting a discriminatory policy applied to a particular class, that is, a class of handicapped persons who are not considered for promotion opportunities and who are not notified of promotional opportunities. The failure to notify is the mechanism by which the Defendants subvert the statutory requirement that they be considered for promotion. This discriminatory policy does not require

individual disparate treatment. See Plaintiff's pending Motion for Summary Judgment.

Defendants maintain "the agency utilizes published promotion procedures to determine the extent to which Claimant should receive consideration for promotion." Defendants' Supplemental Brief p. 7. These published promotion procedures are discriminatory. Thus, Plaintiff has clearly and properly articulated a discrimination cause of action and one which should proceed in this Honorable Court.

Respectfully submitted,
ROY, SHECTER & VOCHT, P.C.

By:_____
WILLIAM A. ROY
DATED: October 8, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, CHARLES GAVETTE, by and through his attorneys, ROY, SHECTER AND VOCHT, P.C., and for his Answer to Defendants' Motion For

Summary Judgment, states as follows:

1. Plaintiff agrees that this Court should hold in abeyance these proceedings pending decision of the Merit System Protecting Board (MSPB). Plaintiff had previously advised Defendants that he would so stipulate.

2. Plaintiff timely field this action. See Exhibit A, Plaintiff's Answers to Defendants' Interrogatories, Exhibit B, certified mail setting forth date of receipt of EEOC rights to sue letters. Defendants offer no evidence other than their bare allegations to refute this.

3. Defendants have already determined that Plaintiff is qualified for promotion to a Grade 13 position.

Exhibit C.

4. It is undisputed that the law provides that as a result of Plaintiff's worker's disability compensation award, he is eligible for promotions. The dispute appears to be whether that provisions apply when there is no support for Defendant's position that it does not.

5. Appropriate analysis of the precedent on which Defendants rely reflect its inapplicability to the case at bar.

WHEREFORE, Plaintiff prays that this Honorable Court deny Defendants' Motion For Summary Judgment, and award Plaintiff his costs and attorney fees so wrongfully sustained in opposing this

Motion.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.

By: _____
LYNN H. SHECTER

DATED: March 6, 1990

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B. The Settlement Agreement in the Previous Action Does Not Involve the Action at Bar

C. Statement and Case Law Permit Plaintiff to File Directly in the District Court

IV. CONCLUSION

TABLE OF AUTHORITIES

Boese V. Department of Department of the Air Force, 784 2F. 2d 388 (Fed. Circ. 1986). . . . . .

Christo v. Merit System Protection Board, 667 F.2d 882 (10th Cir. 1981). . . . . .

Gavette v. Secretary of U.S. Department of Treasury, 84-CV-4109-DT. . . . .

McGovern v. EEOC, 28 MSPB 689 (1985). .

Metsopulos v United States Postal Service, 33 MSPB 536 (1987). . . .

Naekel v Department of Transportation, 850 F. 2d (Fed. Cir. 1988). . . . .

Raicovich v United States Postal Service, 675 F.2d 417 (1982). . . .

Raymond V. Thompson v U.S. Postal Service, MSPB decision DAO 353.9902

Synan v. Merit System Protection Board, 765 F. 2d 1099 (Fed. Circ. 1986). .

Tolliver v. DeNiro, 290 F. 2d 394 (9th Cir. 1986). . . . . .

Wall v. United States, 871 F. 2d 1540 (10th Circ. 1929). . . . . .

Whitfield v. United States Postal Service, 5 MSPB 239 (1981). . . . .

5 USC 8151. . . . . .

29 CFR 16.13.403. . . . . .

5 CFR 1201.151. . . . . .

5 CFR Section 353. . . . . .

53 Fed. Register. . . . . .

FPM 353. . . . . .

FPM Subchapter 3-2 (a) and (b). . . . .

FPM Appendix A. . . . . .

FPM Subchapter 2-3-2 (b). . . . . .

FPM Subchapter 3-1. . . . . .

FPM Appendix A-1 (e). . . . . .

FPM Subchapter 2-6 (a)(1). . . . . .

FPM Subchapter 2-6 (a)(3). . . . . .

FPM Subchapter 2-6 (a(4). . . . . .

FPM Subchapter 4-2 (b). . . . . .

FPM Subchapter 3-2. . . . . .

FPM Subchapter 3-2(b). . . . . .

BRIEF IN SUPPORT OF PLAINTIFF'S ANSWER TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiff, Charles Gavette, an employee of Defendant Internal Revenue Service (IRS), had been awarded worker's disability compensation for two distinct periods of time, August 3, 1879 to May 7, 1982, and January 25, 1985 to January 8, 1986. As a result of the Defendants' failure to comply with requirements to notify him of his reemployment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 USC Section 8151 and FPM 353, Gavette filed two EEOC complaints alleging handicap discrimination. When the EEOC canceled

his claims, he filed the instant action.

When he recovered from the second compensable illness, Plaintiff requested his reemployment rights. Exhibit D, Letter dated January 26, 1986. Defendant IRS denied Plaintiff's request claiming Gavette was allegedly retired prior to the date of his illness, and therefore not qualified for immediate and unconditional reemployment rights of an employee who recovers from a compensable illness within one year.[1] Exhibit E. On September 16, 1987 the U.S. Department of Labor awarded a total disability compensation award for the period of January 25, 1985 through January 8, 1986. See Exhibit G of Defendants' Brief. On October 13, 1987

Plaintiff again requested reemployment. Exhibit H of Defendants' Brief.

On March 11, 1988 Plaintiff filed Administrative EEO Complaint, Agency No. 88-1082. The complaint concerned Defendant IRS' failure to inform Plaintiff of his reinstatement rights, Defendant's refusal to reinstate Plaintiff and its refusal to make a final decision and give Plaintiff his appeal rights. See Exhibit I of Defendants' Brief.

By letter dated March 30, 1988, responding to Plaintiff's October 13, 1987 letter, See Exhibit K of Defendants' Brief, IRS denied Plaintiff's re employment request,

[1]/However, an agency may not disqualify an applicant solely because of his retired status. See Raymond v. Thompson v. U.S. Postal Services, MSPB decision DA 353.99002. Further, IRS February 20, 1986 letter acknowledges Plaintiff was retired effective February 1, 1985, subsequent to the date of his illness.

claiming restoration rights of 5 USC 8151 did not apply[2], because, the IRS claimed, the compensable conditions arose after his alleged retirement. See Exhibit J of Defendants' Brief.

The IRS' March 30, 1988 letter was inaccurate. Plaintiff's illness commenced January 25, 1985. Plaintiff was employed by Defendant IRS at least through February 1, 1985. See Exhibit K of Defendants' Brief. Plaintiff was in fact never voluntarily retired, and the

Court of Appeals reversed the earlier involuntary retirement. See Exhibit D of Defendants' Brief. See also, June 1, 1988 settlement of Civil Action 84 CV-4109-DT, which restored Plaintiff to work.

On April 20, 1988 Plaintiff appealed IRS' March 30, 1988 decision letter to MSPB. See Exhibit K of Defendants Brief. Plaintiff followed the appeal rights as provided by that IRS decision letter.

On May 10, 1988, Plaintiff filed a second Administrative EEO complaint, Agency No 88-1099. See Exhibit K of Defendants' Brief. This was because, as a result of Plaintiff's Freedom of Information Act request, he learned IRS

[2]/The IRS reasons were much different from their initial denial of February 20, 1986. Nevertheless, in that February 20 letter, IRS acknowledged it had placed Plaintiff on disability retirement effective February 1, 1985, after the January 25, 1985 commencement of an illness the Department of bar found was caused by his IRS employment.

had failed to inform and consider him for promotion during the first year of his absence from work during his two separate work-related illnesses, commencing in 1979 and 1985.

On May 13, 1988, Defendant IRS declined to process the first EEO Complaint, No. 88-1082. IRS contended that, since it had denied Plaintiff's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual.

On June 1, 1988[3], Plaintiff and Defendant settled Civil Action 84 CV-4109-DT, reversing the February 1, 1985, involuntary disability retirement, and awarding Plaintiff back pay, and other benefits. The settlement permitted Plaintiff Gavette to pursue any rights he may have accrued under 5 USC 8151 and Federal Personnel Manual (FPM) 353, including employment discrimination claims. See Attachment to Defendant's Brief, paragraph 8.

Defendant IRS, by letter dated June 14, 1988, Exhibit F, informed Plaintiff that it terminated the second EEO Complaint, No. 1099. IRS contended, as it does today, that the June 1, 1988 settlement of Civil Action 84 CV-4109-DT

resolved Plaintiff's discrimination claims.

3/Defendant calls this May 28, 1988.

Plaintiff then appealed the two EEO Complaints to the Equal Employment Opportunity Commission (EEOC) on June 21, 1988 and July 6, 1988. The EEOC denied each of the two Complaints on, respectively, August 30, 1988 and September 1, 1988.

Plaintiff petitioned to EEOC for review on September 28, 1988. On March 4 and March 6, Plaintiff received by certified mail, the EEOC final decisions, which again supported the IRS' termination of processing those complaints. On April 3, 1989, Plaintiff

timely appealed EEOC' s final decisions.[4]

For Plaintiff's illness commencing August 3, 1979, Defendant failed to comply with the requirements set forth in the Appendix. For example, Defendant failed to notify Plaintiff of and to

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4/It is true that 29 CFR 1613.403 provides a plaintiff the option to file a mixed case complaint with the agency or a mixed case appeal with MSPB, pursuant to 5 CFR 1201.151, but not both. However, the agency is to advise the person (s)he may not initially file both and that whichever is filed first shall be considered an election to proceed in that forum. The agency did not inform Plaintiff as required. Secondly, Plaintiff has pursued his appeal rights in the two EEOC appeals and the MSPB appeal, just as had been explained to him in each decision letter. Further, case law has given Plaintiff both paths to pursue. See, e.g., McGovern v EEOC, 28 MSPB 689 (1985), infra.

consider him for of his immediate and unconditional employment rights or of his priority reemployment rights.[5]

Regarding Plaintiff's illness commencing January 25, 1985, Defendant IRS failed to comply with all the requirements set forth in the Appendix. For example, Defendant again, failed to notify Plaintiff of, and to consider his for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him for his immediate and unconditional employment rights, or of his priority re employment rights.

It is clear Defendant failed to comply with any and all of the requirements whatsoever at any time

during either of Plaintiff's cited illnesses. Plaintiff in his EEO Complaints alleged Defendants. IRS delay in providing a decision was caused by Defendant's attempt to reach a more favorable settlement in Civil Action 84 CV-4109-DT. It is clear on its face, however, that by reserving his rights under 5 USC Section 8151 and FPM 353, Plaintiff did not concede his claim for promotion in that agreement.

Precisely because Plaintiff was not given his right for promotion(s) during the first year of both of his illnesses

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5/Plaintiff could have been reemployed as early as May 7, 1982 after the first illness.

is why he seeks this remedy in this litigation. The Plaintiff's rights for

reemployment were not provided and as a result he has lost even further opportunity for promotion(s). That positions above GS-11 are filled competitively is irrelevant, as Plaintiff Gavette as never notified of the available positions during the periods of his being absent from work due to a compensable illness caused by his employer.

I. THIS LAWSUIT was FILED TIMELY.

For the reasons set forth in Plaintiff's Answer, this suit was timely filed. No matter what the dates on the right-to-suit letters, the certified mail reflects the dates of receipt of March 4 and March 6. Thus, this Court has subject matter jurisdiction.

II. PLAINTIFF IS PROPERLY BEFORE THIS COURT AS HE HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

An aggrieved party who does not receive a decision within 120 days of his or her filing with the Merit Systems Protection Board, may proceed in Federal District Court. Even the case on which Defendants rely, McGovern v.EEOC, 28 MSPB 689, 691 fn. 1 (1985) recognizes the section permits "an alternative and additional writ of appeal of . . . discrimination claims, simultaneous, but not necessarily superior, to . . . Board [MSPB] appeal." (emphasis added)

Plaintiff's rights to proceed under 5 USC Section 8151 were specifically reserved by the settlement agreement between the parties in Gavette v.

Secretary of U.S Department of Treasury, 84-CV-4109-DT. See, Attachment to Defendants' Brief.

III. PLAINTIFF HAS STATED A CLAIM ON WHICH RELIEF MAY BE GRANTED.

A. Plaintiff Requests Remedies in this Action That He Has Never Received.

Plaintiff filed two workers' compensation claims for which he was awarded compensation for the following two periods: August 3, 1979 through May 7, 1982, and January 25, 1985 through January 8, 1986. See, Exhibits A and E of Defendants' Brief. Plaintiff's reemployment rights for the two periods of compensable illness are covered by 5

USC 8151(b)(2) and 5 USC 8151(b) (1) respectively. In the case of the later illness Plaintiff's reemployment rights were immediate and unconditional because his recovery occurred in less than one year. With respect to the 1979 illness, Plaintiff's reemployment rights are controlled by the rules of priority consideration. Those rights, and all other rights Plaintiff has pursuant to 5 USC 8151 and FPM 353, were separate and apart from the settlement in Gavette v. Secretary of U.S. Department of Treasury, Civil Action 84-C-4109-DT. That lawsuit had challenged Gavette's February 1, 1985 involuntary disability retirement. Any rights to which Plaintiff is entitled as a result of the

two workers' compensation claims were not at issue in that former litigation. Accordingly, those rights were not resolved.

In fact, the parties specifically reserved those rights, in paragraph 8 of the June 1, 1988 Stipulation for Compromise Settlement. See, Attachment to Defendants' Brief.

The present action is brought pursuant to Plaintiff's rights provided for by 5 USC 8151 and FPM 353. Defendants clearly discriminated against Plaintiff by both not informing him of his rights and denying him those rights once he became aware and claimed them. He did not receive those rights and was not reemployed until the settlement in

84-CV-4109-DT. He, in fact, did not return to work until July 5, 1988. Had he received his promotional and reemployment rights when he was supposed to, he could have continued his career and received promotions for that entire period. Additionally, Plaintiff was automatically entitled to promotions during the first year because of an employment-related disability.[6]

As those rights were not part of the previous litigation, the amendments to 5 CFR Section 353, Restoration to Duty from Military Service or Compensable Injury, which Defendant IRS asks this Court to apply, were not effective until February 16, 1988. They do not apply to the issue at bar, as

they became effective after Plaintiff's cause of action arose. The Office of Personnel Management (OPM) in reviewing comments concerning the amendments, called it a "new proposal" and noted that all agencies responding "view it as a substantial improvement." 53 Fed. Register 857. Thus, OPM recognizes the amendments were a substantial change. There is no statement that the new regulations were to be retroactive. See also, MSPB Decision, 8/19/88. Exhibit M of Defendants' Brief. Accordingly, this Court should reject the offer to render the regulations retroactive. The previous rule, which was the

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[5]/Promotion rights are available to all persons absent because of a work-related

condition during their first year of absence. This interpretation is supported by logic and by the language of the Federal Personnel Manual (FPM). An employee who is out because of a compensable injury cannot know the duration of the absence. Thus, during the first year, (s)he is eligible automatically to be considered for promotion. Indeed, "[a]n agency must consider absent employees for every promotion they could he considered as if they are present." FPM Subchapter 3-2(a).

rule in effect during the pertinent period gave employees absent because of compensable injury, the right to be considered automatically for all promotions and the right to reemployment.

These are precisely the rights which were not given Plaintiff, and are remedies which he seeks through this

litigation. This relief has never been given him, and thus Plaintiff was not given his 5 USC Section 8151 rights. That positions above GS-11, not 12, are filled competitively is irrelevant, as Plaintiff Gavette was never notified of available positions during the two separate periods of his workers' disability compensation: He was further never notified of the need to seek reinstatement within 30 days of recovery from his compensable illness. Thus, because he never knew he had the right, he never waived it, and the Defendants cannot now claim he did not exercise his rights on time.

It is significant that as part of Plaintiff's EEOC claims, See,

Exhibits I and L of Defendants' Brief, he objected to Defendants' attempts to link his request to return to work following the conclusion of his work-related disability, to settlement of the previous case.[7] Defendants continue to attempt to tie together the settlement and compensation cases by their argument in today's Motion.

B. The Settlement Agreement in the Previous Action Does Not Involve the Action at Bar

The only connection the settlement agreement has with the present action is if the agency takes the position that Plaintiff's illness was not caused by his IRS employment,

and that therefore, he is not entitled to any rights provided for by 5 USC 8151 and FPM 353. This argument has no merit. However, basic to an award of workers' compensation is that the illness must be precipitated or aggravated by factors and conditions of employment. It is therefore, clear that when the Department of Labor ruled in Plaintiff's favor, the decision was made

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7/Not only did Defendants refuse to return Plaintiff to work, but the agency as well failed to comply with the following rights. Agency Action When Employee Leaves states:

When an Agency fails to restore an employee within the time limit specified or refuses to restore the employee, the Agency must immediately:

1. Notify the employee in writing;
2. Give the reasons for not restoring;

3. Inform the employee of the right to appeal to the Commission, the time limit for filing an appeal and the address of the office of the Commission to which an appeal should be sent; and
4. Send a copy of the notice to the Commission.

FPM Appendix A

that the illness was work-related. Accordingly, those rights apply to Plaintiff.

C. Statement and Case Law Permit Plaintiff To File Directly in District Court

The applicable statutory provision, 5 USC Section 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during

which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation . . . the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion . . . ."

The purpose of this provision is to put workers in the position they would have been in had they not been injured.

Raicovich v. United States Postal Service, 675 F.2d 417 (1982).

In Metsopulos v. United States Postal Service, 33 MSPB 536, 539 (1987), the Board held it was the agency's burden to submit evidence regarding available positions (including competitive supervisory positions, if at issue), and any restrictive qualification requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee.[8] See also, Whitfield v United States Postal Service, 5 MSPB 239 (1981).

As for the earlier compensation award, this is covered by 5 CFR 353.307, which entitles an employee whose

recovery takes longer than one year to priority consideration for restoration to the position, in view of an application for reappointment made within 30 days after compensation ceases. The request requirement is waived, however, where the agency's in the case at bar, fails to advise the employee "of his rights, obligations, and benefits relating to his Government employer." 5 CFR 353.106.9 Thompson v United States Postal Service, MSPB Decision DAQ 353.9902 (1981).

At the very least, Plaintiff can establish by non-speculative evidence that he would have been promoted, Boese v. Department of the Air Force, 784 F. 2d 388, 390 (Fed. Cir.).

[8]Metsopulos was determined under Section 8151(b)(2) which is analogous to 8151(b)(1), the subject section at bar.

[9]Thus, for example, Plaintiff should have been reinstated at a higher level prior to the settlement agreement. In view of the fact that the IRS chose to give Plaintiff a lump sum award, taxable at the higher rate, in conjunction with the settlement agreement, had Plaintiff been reinstated on a timely basis, he would not have lost half his salary to taxes. Of course, this is in addition to the harm Plaintiff suffered when he was denied reinstatement after his first period of compensable illness.

1986), a requirement which the Hoese case found that Plaintiff did not sustain, although that judgment was made following a trial before the KSPB. Evidence that the individual is able to perform the duties of the higher-graded positions for which tie seeks retroactive promotion is significant.

Naekel v. Department of Transportation, FAA, 850 F.2d 682, 684 (Fed. Cir. 1988).

Although Naekel suggests that now Plaintiff may have to demonstrate he would have obtained the position, the application of Metsopulos and Whitfield. as well as Section 8151(b)(1), demonstrates that where the agency fails in its burden to provide Plaintiff with relevant information to permit him, to proceed with promotion(s), Defendants have rendered it impossible for Plaintiff to meet that particular burden. "Each promotion made under this section is to be effected on the day it would be effected if the employee were present." FPM Subchapter 2-3-2(b).

Plaintiff never applied for

promotion because Defendants failed to tell him he could apply, and did not tell him the positions he could apply for. By violating the rules which require Defendants to advise Plaintiff of his rights, the Defendants themselves created the situation which prevented Plaintiff from obtaining the promotions, promotions for which Defendants themselves have acknowledged he is eligible.[10]

10/It is clear that Plaintiff was qualified for at least Grade 13 positions. In 1971, 90.8% of his work was at Grade 13 or above. In 1979 he was on a qualified for GS-13 promotion roster. In October 1989, he was declared eligible for a GS-13 promotion. Exhibit C. Thus, all Defendants' allegations concerning Plaintiff's claimed performance deficiency accomplishes is the creation of a genuine issue of material fact,

rendering this unsuitable for summary disposition. See, also, Dxhibit D to Defendants' Brief.

In Wall v. United States, 871 F.2d 1540, 1542, 1543 (10th Cir. 1929), relied on by defendants, the Court found "the matter is not necessarily free of all doubt", but ruled, however, that Plaintiff can file a both request for review of an unfavorable Board decision or a suit alleging discrimination in District Court. This thus supports, not a claim for lack of jurisdiction but an argument to hold the case in abeyance. See also, Synan v. Merit System Protection Board, 765 F.2d 1099 (Fed. Cir. 1985) (Plaintiff is entitled to a trial de novo on the discrimination

issue after the Board decides.); Tolliver v. DeNiro, 290 F.2d 1394 (9th Cir. 1986).

However, Plaintiff always has the right, as does Plaintiff at law, to file a civil rights case in the District Court, separate and apart from the Board decision. E.g., Christo v. Merit System Protection Board, 667 F.2d 882 (10th Cir. 1981); Wall, 871 F.2d at 1545-1546 (dissent). This then supports the position that the Court may proceed with this action quite independently of the MSPB decision.

Defendants' Motion should be denied.

ROY, SHECTER AND VOCHT, P.C.

By:_____
LYNN H. SHECTER (P-24845)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

Dated: March 6, 1980

APPENDIX

The Federal Personnel Manual provisions in effect during the required time period provide:

> "Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed, or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved."

FPM Subchapter 3-1

> "When employees sustain a compensable injury the agency must tell them .... about .... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave of absence must know exactly when to report for work after recovering from injury .... On things employees must decide fro themselves, they should have all the information necessary to make a good decision, for example,

decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until returning, and the right to leave their retirement deductions or to take a refund"

FPM Appendix A-1(e)

"If any employee has recovered within one year after the date of compensation begins... the employee is entitled to resume his or her former or an equivalent position."

FPM Subchapter 2-6(A(1)

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee fully recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination.

FPM Subchapter 2-6(a)(4)

"If an employee's recovery takes longer than one year from the date

compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his or her former or an equivalent position ...."

FPM Subchapter 2-6(a)(3)

"Restoration right is agency wide. The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency.

FPM Subchapter 4-2(b)

"An agency must consider absent employees for every promotion they would be considered for if they were present."[11]

FPM Subchapter 3-2(a)

11/This did not happen. The agency did not notify Plaintiff of promotional opportunities. If he did not know, he couldn't apply. Having thus deprived him of the opportunity to apply, Defendants take the position that they are absolved of liability because

Plaintiff never applied. Exhibit A Defendants' Answers to Interrogatories. Additionally, had Plaintiff rightfully and timely been reemployed he would not have lost the opportunity to advance in his career.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE

Plaintiff,

Case No.
89-CV-71021-DT

v.

HON. AVERN COHEN

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER AND VOCHT, P.C.
LYNN H. SHECTER (P-24345)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

FRANCIS L. ZEBOT (P-22700)
Assistant U.S. Attorney
Attorney for Defendant
817 Federal Building
Detroit, Michigan 48226
(313) 237-4777

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES

NOW COMES the Plaintiff, CHARLES E. GAVETTE, by and through his attorneys, ROY, SHECTER AND VOCHT, P.C., and for his answer to Defendants' First Interrogatories, states as follows:

These answers are made without waiver of, and with preservation of:

All questions as to competency, relevancy, materiality,

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present.

FPM Subchapter 3-2(b)

The applicable statutory provision 5 USC A Section 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving

compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service."

(b) Under regulations issued by the Civil Service Commission.

> (11) The department or agency which was the employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation .... [t]he right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion .... " (emphasis added)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable

> efforts to place and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

privilege and admissibility of the answers and the subject matter thereof as evidence for any purpose in any further proceeding in this action (including the trial of this action) and in any other action;

The right to object on any grounds at any time to a demand or request for a further request to these or any other interrogatories or other discovery proceedings involving or relating to the subject matter of the interrogatories herein responded to; and

The right at any time to revise, correct, add to, supplement or

clarify any of the answers contained herein. The following answers (and any further answers to these interrogatories or to their subject matter) are made expressly without acknowledgment of materiality or relevance of the interrogatories or that the Interrogatories are in an way reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORIES

1. Please indicate the date upon which you received a copy of the Equal Employment Opportunity Commission (EEOC)'s Denial of Request to Reopen dated February 22, 1989 in Charles E. Gavette v. Nicholas Brady Secretary of the Treasury (EEOC Request No. 05890016;

EEOC Appeal No. 01882445; Agency No. 88-1082).

I received the Denial of Request to Reopen on March 6, 1989.

2. Please indicate the date upon which you received a copy of the EEOC's Denial of Request to Reopen dated February 22, 1989 in Charles E. Gavette v. Nicholas Brady, Secretary, Department of the Treasury (EEOC Request No. 05890057; EEOC Appeal No. 01883024; Agency No. 88-1099).

I received the Denial of Request to reopen on March 4, 1989.

_____

CHARLES E. GAVETTE

Subscribed and sworn to before me
this _____ day of January, 1990.

_____
CANDICE B. WIGGLE, Notary Public
OAKLAND COUNTY, Michigan
My Commission Expires: 02/25/91

ROY, SHECTER AND VOCHT, P.C.

By: _____
LYNN H. SHECTER (P-24845)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICIAL BUSINESS
Penalty for private use $300

POSTAGE AND FEES PAID
Equal Employment Opportunity Commission

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON. DC. 20507

OFFICIAL BUSINESS
Penalty for private use $300

POSTAGE AND FEES PAID
Equal Employment Opportunity Commission

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

MEMORANDUM

to: Mr. Charles E. Gavette
Field Audit Group 3-5
thru: Audit Division
from: Acting Chief, Personnel Branch

subject: Position Classification Appeal

In accordance with IBM 0511.52 and related directives, we have completed our review of the facts on which your position classification appeal is based. In your appeal you have stated that you believe your position is improperly classified as Internal Revenue Agent GS-512-11 (SPD-226) and should be classified as Internal Revenue Agent GS-512-12. We have sustained your appeal.

You have stated that you agree that SPD-226 is properly classified as Internal Revenue agents-512-11 but that SPD-226 is in appropriate for your position since you believe your workload exceeds the kind of work described as typical of the GS-11 level, and equates more accurately to the GS-12 level as described in GS-512 Internal Revenue Agent classification standards published by the U.S. Civil Service Commission.

Mr. John Sommer, Position Classification Specialist, visited you at your work

site on January 4, 1972 to desk audit your position. He examined with you and with your supervisor, Mr. Ralph Wilson, duties and responsibilities of your position, the amount and degree of supervision exercised over your position, and your workload for the current period, and for calendar years 1970 and 1971.

Our findings are as follows:

1. We find that your work has been properly assigned following accepted management practices.

Your workload consists of assignments tentatively evaluated under the grade-level-of-case criteria contained in IRM supplement 4(10)G-3. At the time of assignment, approximately 75% of your cases have been tentatively evaluated at GS-11 level and approximately 25% have been tentatively evaluated at GS-12 level.

2. Analysis of your completed cases during the calendar years 1970 and 1971 discloses that well over 50% of your cases were evaluated at GS-12 and GS-13 level upon completion. (In 1970 the cases above GS-11 level constituted 74.3% of your direct examination time and in 1971 cases GS-12 level constituted 90.8% of your direct examination time.

3. In our opinion, the tentative grade level of cases were properly identified when assigned to you. The differences between tentative grade level of cases and completed grade level of cases are the result of your investigative ability, initiative, and determination to develop all the significant issues in each case. We find this is clearly due to your impact on the job.

4. We feel that your position should be re-classified from Revenue Agent GS-512-11 (SPD-226) to Revenue Agent GS-512-12 (SPD-227). The standard position description (SPD-227) has been certified as a complete accurate description of your duties by you, your supervisor Mr. Wilson, and by the Position Classifier Mr.Sommer.

As required under current grade control procedures, a request for permission to fill a vacant GS-12 position will be forwarded to the Central Region.

Gordon Young

INTERNAL REVENUE SERVICE
MEMORANDUM

date: MAY 01 1979

to: Charles Gavette

from: Banking Official

subject: MPA#22-79
Position Internal Revenue Agent,
GS-512-13
POD: Detroit, Dearborn, Mt.
Clemens, Pontiac and Southfield

I would like to express my appreciation for your application for the above position.

You were ranked ____ Best-Qualified ____
Highly-Qualified ____ Qualified ____ for
the position.

After careful consideration of
Best-Qualified candidates, the following
selection(s) was/were made.

None 6 month roster
This determination should not prevent
you from applying for other vacancies.
Counseling regarding our status in the
ranking process may be obtained from
your manager.

Paul C. Lally
EXHIBIT A-14

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

January 27, 1986

Mr. Arthur Shahly
Chief Personnel Branch
Internal Revenue Service
Employment Programs Section
P.O. Box 32500
Detroit, Michigan 48226

Dear Mr. Shahly:

I am hereby providing your office of Internal Revenue Service my request to be returned to duty immediately. I am ready, willing and able to return to work as an Internal Revenue Agent.

This request is made pursuant to a federal employees immediate reemployment right, following an injury or illness caused by factors or conditions of employment.

I further request consideration for reemployment pursuant to any and all other reemployment rights I possibly may be entitled to. I request Internal Revenue Service timely advice and/or counsel me of any and all reemployment rights I might possible be entitled to,

under any Federal laws or regulations.

Sincerely,

C. E. Gavette

CEG/ch

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

January 27, 1986

Mr. Arthur Shahly
Chief Personnel Branch
Internal Revenue Service
Employment Programs Section
P.O. Box 32500
Detroit, Michigan 48226

Dear Mr. Shahly:

I am hereby providing your office of Internal Revenue Service my request to be returned to duty immediately. I am ready, willing and able to return to work as an Internal Revenue Agent.

This request is made pursuant to a federal employees immediate reemployment right, following an injury or illness caused by factors or conditions of employment.

I further request consideration for reemployment pursuant to any and all other reemployment rights I possibly may be entitled to. I request Internal Revenue Service timely advice and/or counsel me of any and all reemployment rights I might possible be entitled to,

under any Federal laws or regulations.

Sincerely,

C. E. Gavette

CEG/ch

Internal Revenue Service
Department of the Treasury
477 Michigan Ave.
Detroit, Michigan 48226

Person to Contact: Lynn Wilton
Telephone Number: 226.6459

Mr. Charles Gavette
6816 Bluegrass
Clarkston, Michigan 48016

Refer Reply to: RM:P:LMR
Date: Feb 20 1986

Dear Mr. Gavette:

This is in response to your letter of January 27, 1986, requesting you be returned to duty.

As you have been previously advised, it is our position that as of February 1, 1985, you are retired on disability. As noted in Clarence Barne's letters of October 24, 1985, and November 27, 1985, by John A. Freeman, Assistant Regional Counsel, under Title 5 C.F.R. Section 831.502(f)(1) "a disability annuitant say be reemployed in any position for which he/she is qualified." Part 306 of Office of Personnel Management Regulations also provides that an agency

may hire a disabled annuitant, prior to a finding by OPM that the individual is recovered. Such reemployment, however, is solely the agency's election.

We have considered your request for employment. However, we have no available revenue agent positions. You are, of course, free to apply for a position with other agencies.

Sincerely yours,

Arthur Shahly
Chief, Personnel Branch

cc: Regional Counsel

DEPARTMENT OF THE TREASURY
REGIONAL COMPLAINTS CENTER
WASHINGTON

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TD No. TD No. 88-1099

Dear Mr. Gavette:

On May 28, 1988, you agreed to voluntarily settle your complaint of discrimination by signing Stipulation for Compromise Settlement in Civil Action No. 84-CV-4109-DT. Said settlement agreement further resolves your complaint of discrimination TD No. 88-1099. Therefore, the remedial action agreed upon has already begun and the Regional Complaints Center has terminated the administrative processing of your complaint.

If you have any questions regarding this matter, please contact Elizabeth Richardson of my staff at 376-0394.

Sincerely,

James E. Rogers, Jr.
Director

Mr. Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

INTERNAL REVENUE SERVICE
DETROIT DISTRICT

Merit Placement Announcement

SERVICEWIDE PROMOTION PLAN (IRM 0335)
Regional Management Careers Program

TITLE SERIES AND GRADE:
(1) Internal Revenue Agent, Entry Level Management Trainee, GM-512-13

ORGANIZATIONAL LOCATION AND POD:
Examination Division, Office Of the Chief,
POD: Detroit, MI

AREA OF CONSIDERATION: DISTRICT WIDE

DUTIES AND RESPONSIBILITIES: The incumbent will be selected under the Management Careers Program for assignment to an entry level managerial position in a specific functional area of the Examination Division such as a group supervisor. As a member of a cadre or an individual selectee in the career program, incumbent serves as an assistant to a branch chief or other appropriate management official. During this assignment, incumbent is enrolled in a comprehensive supervisory and management training program,

generally of two to three months duration, and upon completion performs a variety of developmental assignments or managerial duties.

QUALIFICATION REQUIREMENTS: GENERAL EXPERIENCE: 4 years of progressive experience which provided a knowledge of generally accepted principles, theory, and practices of accounting and auditing. SPECIALIZED EXPERIENCE: Type A Experience – 2 years in professional auditing or accounting work as described above. Type B – 1 year of Type A work in analyzing and interpreting diversified accounting system for federal tax liabilities. At least one year of experience is required at the GS-12 level to qualify for the GM-13. Experience must have included one year of managerial experience or have demonstrated the potential ability to perform the managerial duties of the position.

SELECTIVE PLACEMENT FACTOR: NONE

BANKING METHOD: Performance Appraisal 3861 or Merit Pay Appraisal Form 6477, Report of Managerial Potential, Form 6568, Management and Executive Career Questionnaire, Form 5459, experience and award, self-development and interviews

(optional)

HOW TO APPLY: Managers should ensure that eligible employees under their supervision are informed in sufficient time to apply (or file Form 4536 for the employee). Employee should advise managers of position interests as well. EMPLOYEES WILL NOT BE ALLOWED TO COMPETE THIS COMPETITIVE ACTION IF THEY HAVE AN UNACCEPTABLE RATING IN A CRITICAL ELEMENT OF THIS POSITION. File Form 4536 with the Personnel Office on or before the closing date. If interested in this vacancy only show announcement number at top right. If you wish consideration for one year show "CONTINUOUS CONSIDERATION" at top right. Please include setup number and stop number on interest card.

OTHER: Applicants are responsible for ensuring that an accurate record of pertinent and awards is documented on Form 4536. "The determination of the payment of location expenses will be made in accord with guidance contained in IRM 0335.2662 and 1703 (Chapter 500)." This is a non/critical sensitive position. A character investigation is required.

Chief, Employment Programs Section
P.O. Box 32500, Stop 5
Detroit, MI 48232

qualified applicants will receive consideration without discrimination for a non-merit such as age, sex, color, religion, national origin, political affiliation, physical. etc.

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SUPREME COURT, U.S.
FILED
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No. 91-2062

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES E. GAVETTE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in granting summary judgment to respondent on petitioner's claim of employment discrimination based on petitioner's failure to raise a genuine issue of fact with respect to a viable theory of discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 71-78)[1] is unreported, but the judgment is noted at 951 F.2d 349 (Table). The opinion of the district court (Pet. App. 1-14) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. 236-303) is reported at 44 M.S.P.R. 166.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. The petition for a writ of certiorari

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[1] For convenience, we refer to the unnumbered pages of the appendix as if they were numbered consecutively.

was filed on March 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. While petitioner was employed by the IRS, he became disabled by mental illness for two periods (1979-1982 and 1985-1986). Because he believed that the IRS had discriminated against him during those periods on the basis of age and handicap, by failing to notify him of promotional rights and consider him for promotion in violation of 5 U.S.C. 8151, he sought relief from the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). Pet. App. 6-7, 72; see 5 U.S.C. 7701(a); 42 U.S.C. 2000e-5(b).

2. The EEOC denied petitioner relief and notified him of his right to sue in federal district court. See 42 U.S.C. 2000e-5(f)(1). Before the MSPB reached a decision, petitioner filed the present action in federal district court.[2] The district court deferred action on respondent's motion for summary judgment pending the MSPB's decision.

3. The MSPB rendered a final decision in March 1990. Pet. App. 236-303. This decision concluded that the IRS had violated 5 U.S.C. 8151 by failing to give petitioner adequate consideration for competitive promotions. Pet. App. 262-276. On the other hand, the MSPB concluded that petitioner had failed to meet his burden of proving

[2] Despite the pending MSPB proceeding, this was permissible, because the Board failed to reach a decision within the statutorily specified 120 days. See 5 U.S.C. 7702(e)(1)(B). Because petitioner's litigating position has not been clearly articulated, it is not clear whether this action challenges the EEOC determination or the later MSPB determination. Thus, the court of appeals noted that "it appears that [petitioner] is suing pursuant to his right to sue letters from the EEOC agency," but also explained that petitioner's "counsel agreed that the only issue on appeal was as to the [IRS's] compliance with the MSPB order." Pet. App. 74 n.1.

handicap discrimination because he failed to show that he was a qualified, handicapped individual. *Id.* at 279-283. The opinion explained that if petitioner was unsatisfied with the agency's compliance with the MSPB's order, he should "file a petition for enforcement * * * within 30 days of the agency's notification of compliance." *Id.* at 289-290.

4. In response to this order, respondent notified petitioner that he was ineligible for promotion because he had not filled out the Form 4536 or "interest card"[3] during the relevant period. The notice advised petitioner that, in the IRS's view, the notice constituted compliance with the order of the MSPB. Pet. App. 10-11. Petitioner did not challenge this notice within thirty days.[4]

5. The district court granted summary judgment for the IRS. Pet. App. 1-14. At the hearing on the summary judgment motion, petitioner's counsel agreed with the court's conclusion that "the argument really is over whether or not there was compliance [with the MSPB order]." *Id.* at 4. The court then observed that "there is a procedure * * * for allowing * * * the Board to determine whether or not there was compliance and nobody has taken that [within the prescribed time limit]." *Id.* at 5. The court then noted that "[f]ailure to raise the issue of non-compliance with the [MSPB] may constitute abandonment of [petitioner's] claim." *Id.* at 11. Finally,

[3] An essential element of respondent's merit promotion plan is submission in advance of a written expression of interest in the position sought, either for a particular vacancy or continuously for a particular position.

[4] Petitioner challenged the IRS's action in a petition for enforcement of the MSPB's order filed with the MSPB on January 19, 1991, 227 days beyond the 30-day period. The Administrative Law Judge dismissed the petition on April 16, 1991, in decision No. CH035388C0382. Because petitioner did not file a timely petition for review with the MSPB, the decision is now final.

it concluded that "[w]hether or not the action of the IRS complies with the orders of the [MSPB] is for the * * * Board in the first instance to determine." *Id.* at 12. Accordingly, the court granted summary judgment for the IRS "without prejudice to the rights of [petitioner] to apply to the [MSPB] for further relief regarding enforcement of its order." *Id.* at 13.[5] Additionally, the court noted that "there is nothing in the record to suggest the IRS treated on-the-job employees any differently then [*sic*] those on disability leave regarding promotional opportunities." *Id.* at 12.

6. The court of appeals affirmed in an unpublished opinion. Pet. App. 71-78. Acknowledging the lack of clarity in petitioner's presentation, it concluded that "it appears that" petitioner's case was challenging the EEOC determination, not the MSPB determination. *Id.* at 74 n.1. It noted the district court's holding that "there was no evidence in the record of discrimination against [petitioner]." *Id.* at 73. Based on its "examination of the record on appeal," *id.* at 75, the court agreed with the district court's conclusion. The court noted petitioner's argument that he did not receive certain notices provided able-bodied employees, but concluded that this "is not the theory upon which [petitioner] proceeded in the trial court." *Id.* at 76-77. Alternatively, it pointed out that petitioner did not "point out evidence demonstrating that on-the-job able-bodied employees received [the] advice" in question. *Id.* at 77. The court agreed that the IRS did "post notices on a bulletin board at the workplace," but noted that petitioner "failed periodically to check the posted notices or call the office of personnel management for promotion information." *Id.* at 77-78. Hence,

[5] As noted above, petitioner subsequently sought further relief, but was unsuccessful because of his failure to comply with MSPB filing deadlines. See note 4, *supra*.

"because [petitioner] did not posit to the district court a viable theory of discrimination supported by summary judgment evidence," the court of appeals affirmed. *Id.* at 78.

ARGUMENT

1. Petitioner first argues (Pet. 12-26, 29-32) that evidence suggesting that the IRS failed to comply with certain notification requirements adequately supported his claims of discrimination on the basis of handicap. He does not address, however, the finding of the MSPB that he failed to show that he was a qualified, handicapped individual. See Pet. App. 279-283. Nor does he offer any reason to believe that the lower courts' conclusion that petitioner has offered no substantial evidence of discrimination raises a substantial legal question of general significance.

2. Petitioner also argues (Pet. 26-29) that, even if the IRS did not discriminate against him on the basis of handicap, he is entitled to relief based on the IRS's affirmative obligation to accommodate the handicapped. This argument was not adequately presented to the court of appeals and thus was not considered by that court. See Pet. App. 74 n.1 (discussing the lack of clarity in petitioner's arguments to the court of appeals). Accordingly, it is not properly before this Court. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

3. Finally, in his supplemental brief, petitioner argues that the IRS did not adequately comply with the MSPB's Order. He does not, however, contest the district court's conclusion (Pet. App. 11-12) that the district court had no authority to entertain that claim. Accordingly, that argument does not suggest that the

district court erred in granting summary judgment for the IRS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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AUGUST 1992

Supreme Court, U.S.
F I L E D
SEP 3 1992
OFFICE OF THE CLERK

In the Supreme Court of the
United States

1991-1992 Term

Charles E. Gavette,

Petitioner,

v.

Internal Revenue Service

Respondent.

Petitioner's Reply Brief

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In the Supreme Court of the
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Petitioner's Reply Brief

This Reply Brief is necessitated by the Respondent IRS' insisting that it resurrect the very issue which confused the Courts below, that is the basic nature of Petitioner's claim.

1. Petitioner filed a Complaint alleging handicap discrimination. This is not an appeal from an adverse decision of the Merit Systems Protection Board

[MSPB]. It is an appeal from dismissal of an original action alleging handicap discrimination, based on two right to sue letters from the Equal Employment Opportunity Commission [EEOC].[1] The only connection between the MSPB action and the EEOC-District Court proceeding which is before this Court, is that the IRS revealed for the first time, as part of the MSPB proceeding, that it would not promote Petitioner because of a discriminatory practice.[2] Petitioner then

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[1] Petitioner's EEOC action preceded his MSPB filing. Therefore, pursuant to 29 CFR 1613.403, this Petition is properly before this Court.

[2] Petitioner claims that the IRS discriminated against him because it violated 5 U.S.C. 8151, requiring the agency to notify persons absent because

of work-related injuries of their eligibility for promotion and of available promotion opportunities, and to consider these handicapped persons, such as Petitioner, for promotion, as if he had been present. The IRS, Petitioner claims, failed to accommodate his handicap, because it merely posted notices of promotions on bulletin boards. Such bulletin boards were not accessible to Plaintiff, who, because he was involuntarily retired during the disputed time period (a retirement which was later retroactively rescinded) was denied access to those bulletin boards. Further, Petitioner, and other handicapped persons absent because of work-related injuries, were unable to physically enter the building to review bulletin boards, and, because of the IRS policy of failing to advise these persons they were eligible for promotion, they would never have sought the information about available positions in the first place. Petitioner was further the victim of disparate treatment, as IRS policy requires supervisors to notify persons absent for other reasons, and who are not handicapped, about promotion opportunities, and, for those non-handicapped employees who are absent for other reasons, supervisors are required

presented this discriminatory practice[3] to the District Court as further evidence to support his claim of handicap discrimination. Petitioner did not seek enforcement of the MSPB Order in District Court.

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to fill in interest cards for these employees, to ensure these employees are eligible to be considered for promotion. During the course of an MSPB proceeding which is not the subject of this petition for certiorari, the IRS revealed that it would not consider Petitioner for promotion because he had failed to fill out an interest card. Had Petitioner been absent for any other reason other than his handicap, his supervisor would have filled in the interest card for him.

[3] Petitioner consistently claimed that the fact that the discriminatory practice described in footnote 1 was initially revealed in the course of an MSPB hearing was irrelevant. What was relevant to the District Court proceeding was that the practice existed, and that Petitioner was injured by this practice.

The IRS, however, in its presentations to the Court of Appeals and to the District Court, claimed that Petitioner was seeking such review, thereby irritating and confusing the District Court and the Court of Appeals. Now, the IRS attempts to revive its obfuscation in this Court. Let us be perfectly clear. Petitioner does not ask this Court to consider the MSPB proceedings, or to determine whether he can request a review of an MSPB decision in District Court.

Petitioner did not address any findings of the Merit Systems Protection Board in this Court because he is not appealing any determination of the MSPB.

Whether the MSPB found he was or was not a qualified handicapped person is irrelevant.[4] Indeed, the District Court did not consider that issue.[5] Whether the District Court, on the record before the District Court, and not on the record made in the MSPB litigation, improperly found there was no evidence of handicap discrimination because it used an

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[4] Petitioner did not appeal the MSPB finding that he was not a qualified handicapped person to any Court, nor did the IRS rely on that finding in the District Court.

[5] While arguing everything else possible, whether or not it was relevant, the IRS never did argue to the District Court that Petitioner was not a qualified handicapped person. Accordingly, its ipse dixit argument to the contrary in its answer to the Petition has absolutely nothing to do with any issue before this Court.

improper test, is relevant, and is one of the bases for this Petition.

Respondent succeeded in misrepresenting Petitioner's position to the Courts below. If there is a lack of clarity in the record, it is the direct result of this IRS obfuscation. An agency of the federal government should not be permitted to so abuse the adversarial process. If this Court has any question about what Petitioner really was in Court to achieve, it can look at the Complaint. As this Honorable Court has so often contended, the Plaintiff's Complaint controls the issues before the Court. The issue before the Court was handicap discrimination.

2. It is significant that the IRS does not dispute that it has an affirmative obligation to accommodate the handicapped. This issue was before the District Court and the Court of Appeals, and indeed, both Courts were presented the case of Harrison v Marsh, 46 FEP Cases 971 (W.D. Mo, 1988), which focused the issue in a case in which the context was strikingly analogous to the case at bar. In Harrison, Plaintiff had a radical mastectomy which prevented her from performing continuous typing. The Court, noting that the official general policy of the United States is that "[t]he Federal Government shall become a model employer of the handicapped

individuals", 29 CFR 1613.703, held that a governmental agency had a high burden to meet when confronted with the need to accommodate a handicapped employee. 46 FEP Cases at 976. The Defendant Army's failure to adequately notify Plaintiff of her rights with regard to interviewing for a new position were held to have violated the Act. 46 PEP Cases at 977.

The District Court and the Court of Appeals erred in failing to balance the IRS conduct and policy against the affirmative duty of accommodation,[6] based

[6] In this case, the duty to accommodate could easily have been accomplished, for example, by mailing notices and by advising Petitioner of his eligibility for promotion. The IRS, for example, regularly mails handicapped persons absent because of work-related

on the federal government's legislatively-mandated role as a model employer of handicapped individuals. The Courts erred by shifting the burden to Petitioner to adapt himself, rather than requiring the IRS to demonstrate any hardship other than administrative convenience in order to justify its failure to accommodate Petitioner, and others similarly situated. The Court of Appeals, further, appeared to hold that the administrative convenience of the agency overwhelmed any duty to accommodate that agency's handicapped

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injuries, worker's compensation checks.

workers.[7]

3. This Petition raises a substantial question concerning the duty of a federal administrative agency to comply with the clear language of an administrative regulation requiring it to accommodate employees handicapped as a result of an illness/injury caused by their employment. The question is raised in the context of the burden to

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[7] The requirements of notification and accommodation which apply to handicapped workers apply equally to employees of governmental agencies absent from work because of service in the armed forces. FPM Subchapter 3-2(a) and 3-2(b). The IRS policy, and the holdings of the courts below, require a soldier to give up his or her promotion rights because that soldier cannot leave duty in Iraq to review the IRS bulletin board in Detroit.

accommodate, with the courts below improperly placing the burden on the employee, in direct contradiction of the duty of the federal government to be a model employer of the handicapped.

CONCLUSION

This Petition should be granted.

Respectfully submitted,

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(313) 540-7660

Dated: August 28, 1992

In the Supreme Court of the
United States

1991-1992 Term

Charles E. Gavette,

Petitioner,

v.

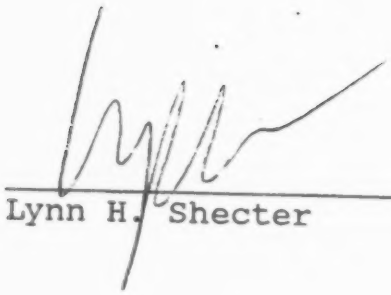
Internal Revenue Service

Respondent.

Certificate of Service of Process

LYNN H. SHECTER, certifies that on September 2, 1992, she mailed two copies of Petitioner's Reply Brief and Certificate of Service of Process, upon Kenneth W. Starr, Solicitor General, United States Department of Justice, attorney for Respondents, whose place of business is located at 10th and Constitution Avenue, N.W., Washington,

D.C., 20530.



Lynn H. Shecter